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In The

Supreme Court of the United States

October Term, 1995

MARGARET M. BAKER, ET AL,

Petitioners,

v.

BANK OF BARTLETT, ET AL,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In this class-action, antitrust price-fixing cause, where the defendant banks have an **irresistible motive** to participate in the alleged conspiracy, did the lower courts err in granting defendants' motion for summary judgment by applying the test set forth by this Court in a 5-4 decision in a predatory pricing case, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.* (1986), when in the most recent case in which this Court last addressed the **proper standard** for summary judgment in antitrust price fixing cases, *Eastman Kodak Co. v. Image Technical Services, Inc.* (1992), this Court explained in clear terms that the increased burden placed on the plaintiffs to survive summary judgment in Matsushita was to be **limited only** to those specific fact situations where the defendant had **no motive** to participate in the alleged price fixing scheme. More specifically,

a. **Even if** the limited tests set out in Matsushita were to apply to the facts herein, which they do not, did the trial judge invade the factfinder's province by accepting the **totally pretextual and conclusory** explanations advanced by the defendants over the **well-reasoned, rational** economic theories of collusion advanced by plaintiffs' expert affiants, **genuine factual** matters which are left up to the jury under our United States **Constitution**, and thereby go beyond the traditional summary judgment inquiry so as to decide for herself the weight of the "evidence", and **thereby directly ignore** the law set down by this Court in Kodak?

PARTIES TO THE PROCEEDINGS

The parties to this petition are the same as the parties to the appeal to the Sixth Circuit. These parties have been the same throughout each level of the civil action below. Plaintiffs are various individuals with bank accounts at one of the named defendant banking institutions, who all have branch locations in Tennessee. The **named plaintiffs** are as follows:

Last Name	First Name	Init
Baker	Margaret	M
Banes	Alvin	
Bossler	Dennis	
Chew	Bettye	L
Clark	Tracy	
Dixon	Sarah	D
Dixon	William	F
Dorse	Laura	E
Freiden	Bradley	
Freiden	Jeffrey	L
Garrison	Pearlie	
Gillespie	Robert	
Gwin	Vickie	
Heeren	John	F
Heggs	Earlene	
Hubbard	Lena	A
Jackson	Sam	E
Johnson	J. Patrice	
Jones	Ronald	E
Kaplan	Rachel	M
Krupp	Michael	K
Lefkowitz	Herbert	

Last Name	First Name	Init
Lester	Brennan	J
Mathews	Catherine	L
Mathis	Robert	W
Mitchell	Cleopra	T
Moskowitz	Jacob	
Richmond	Dora	A
Rivers	Ellis	
Rivers	Lila	
Rogers	Stanley	
Smith	Charlene	O
Thomas	Stuart	B
Turner	Melvin	
Vines	Sandra	L
Walker	Harold	M
Wallace	April	
Warren	Robert	A
Weathington	Bessie	L
Williford	Shirley	A
Wolff	Richard	H
Woods	Howard	A

The **named defendants** are as follows:

Bank of Bartlett; Boatmen's Bank of Tennessee; First American; First Tennessee Bank; Leader Federal Bank for Savings; National Commerce Bancorporation; Sovran Bank; Tri-State Bank; and Union Planters National Bank.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

The Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on July 7, 1995.

OPINIONS BELOW

The opinion of the Sixth Circuit Court from which review is sought has been published at 55 F.3d 1166. This Sixth Circuit opinion has been "retyped" for purposes of this Petition and attached to the Appendix hereto.[1] Any citation to this opinion will be referenced to the page of the appendix. The opinion was originally filed on **June 2, 1995**. A *Petition to Rehear* was timely filed on **June 17, 1995**. An *Order* denying same was entered on **July 7, 1995**. The 90-day period for filing a Petition for Writ of Certiorari to this Court expires on **October 5, 1995**.

JURISDICTION

Jurisdiction in the district court was based upon **federal law**. This **class-action** was instituted under sections 4 and 16 of the Clayton Act (**15 U.S.C. §§15 and 26**) to recover damages sustained by plaintiffs and members of the class by reason of alleged **price-fixing** practices by the defendant banks in violation of Section 1 of the Sherman Act (**15 U.S.C. §1**).

The Sixth Circuit passed final judgment on this case by denying plaintiffs' *Petition to Rehear* on **July 7, 1995**. This Court's jurisdiction is based on 28 U.S.C. Sec. 1254, **"Courts of appeals; certiorari**, which gives this Court jurisdiction to review any judgment of our federal circuit courts.

STATUTE INVOLVED

TITLE 15. COMMERCE AND TRADE , CHAPTER 1. MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE, **15 USCS §§ 1 & 2**

§ 1. **Trusts, etc., in restraint of trade illegal; penalty**

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be

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[1] Likewise, the opinion of the district court and the "Order on Petition to Rehear" have been retyped and appended hereto.

deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 2. **Monopolization; penalty**

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

The defendant banks impose a charge known as an NSF[2] fee on their checking account customers each time a check is presented for payment against that customer's account without sufficient funds on deposit to honor the check. At the time this suit was instituted, six of the defendant banks were charging the same price and as the trial court found, the others were charging "substantially similar" prices.[3] This price was essentially $19. In stark contrast, the cost to the bank of processing these NSF checks is relatively **negligible**. For purposes of this case, the defendants stipulated that this cost ranges from $.15 to $1.50 among the defendant banks.[4]

This NSF charge therefore results in an egregious profit margin to the bank on such "service" charge of many **thousands of percent**, depending on how many days it takes the bank to collect the charge. The proof will show that the bank actually collects its NSF charge **instantly** on a great percentage of such checks - because although the customer may not have sufficient funds to cover the amount of the check, he does have $19 in his account to cover the amount of the charge. This rate of return is thus far, far in excess of the banking industry's desired return of 10-15% on average investments. Assuming that the bank incurs even as much as $1 in expenses in processing the NSF transaction and that it indeed takes as long as 72 hours to actually recover the charge, the **internal rate of return on this $18 profit for a three day transaction on an**

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2 acronym for "insufficient funds."

3 See District Court opinion, **Appendix**, page 13

4 The larger the bank, the cheaper its true "per check processing cost". This decreasing cost is derived as a result of allocating fixed costs to a larger volume of NSF checks handled by such size bank.

annualized basis is astronomical, 2×10^{160} ("two times ten to the one hundred sixtieth power").

To put the magnitude of the percentage rate of profit to the bank in processing a typical NSF check in proper perspective, the number of grains of sand on all the beaches in the world isn't even a start. The number of seconds since the beginning of time doesn't even come close. But start with the number of atoms in the universe. Then imagine you could turn each atom into a universe just like ours, each with just as many atoms as our universe has. Then the number of atoms in all these universes would be very close to the number that this percentage represents.

Petitioners filed their class action Complaint on May 22, 1992 charging the banks with price-fixing in maintaining such NSF prices. The Complaint is founded upon **circumstantial evidence** of a **tacit collusion** among the defendant banking institutions to artificially sustain NSF service fees. Plaintiffs contend that the defendants could not maintain these exorbitant prices and thereby reap this **unconscionable profit** without tacit collusion among the banks not to compete on NSF charges but to instead all "follow the leader" by charging virtually the same price once the "leader" in the market sets the price or initiates any subsequent price increase. Plaintiffs filed affidavits from two expert witnesses,[5] both of whom explain with sound, rational, and well-accepted economic theories why the defendants could not maintain their NSF prices but for tacit collusion.

Interestingly, NSF prices which had averaged about $3 in the Memphis banking industry prior to 1980, began to **rise** dramatically in the early 80s when at the same time, the cost of the computer hardware and software which handles the processing of checks began to **decrease** sharply due to the advances achieved in computer technology. With NSF fees nationwide almost **$5 billion** in 1993,[6] and approximately **$100 million annually in Tennessee alone**, the potential damages for the applicable statutory period, even without treble damages, is enormous. Further, the potential **class of plaintiffs** is conservatively estimated to be **hundreds of thousands** of **persons**.

The respondent banks each filed their respective "Answer" denying any collusion. Petitioners filed "Interrogatories and Requests for Production of Documents" asking the banks therein the very first Interrogatory to **explain the rationale** behind their respective NSF prices with **facts and not pretextual illusions**; stated otherwise, *how each bank independently went about the methodology of setting its*

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5 These complete affidavits can be found at Appendix, pages 20 and 31.

6 and continuing to increase in 1994 and 95.

NSF charge? Specifically, subsection (b) of Interrogatory Number 1 reads, verbatim, as follows:

> **(b) Does your bank set the charge for such services in relation to the cost to the bank in handling such services?**
>
> **(1) If yes, please detail all costs to the bank which you relate to the handling of <u>all</u> such service items and the manner or method in which such costs have been determined and allocated.**
>
> **(2) If not, then <u>how</u> is the charge for each such service derived at?**

This Interrogatory was drafted in light of the "Code of Federal Regulations" issued by the U.S. Comptroller applicable to NSF prices, namely, **CFR 7.8000**. The very first section therein vividly reflects that the drafters <u>readily acknowledge that there is a natural tendency for banks to collude with respect to this service charge at issue herein!</u> This CFR is all the more important because it further helps to prove that the banks' tendered explanation for their NSF prices, addressed infra, is **nothing but pure pretextual**. Specifically, this regulation reads in its entirety as follows (emphasis added):

CODE OF FEDERAL REGULATIONS
TITLE 12--BANKS AND BANKING
Chapter I - Comptroller of the Currency, Department of the Treasury, PART 7--Interpretive Rulings, Subpart E-Miscellaneous, Other Rulings

§ 7.8000 Charges by national banks.

(a) All charges to customers should be arrived at by each bank on a **<u>competitive</u>** basis and **not on the basis of <u>any agreement, arrangement, undertaking, understanding or discussion</u> with other banks or their officers**.

(b) Establishment of <u>deposit account service charges</u>, and the amounts thereof, is a business decision to be made by each bank according to sound banking judgment and federal standards of safety and soundness. **In establishing deposit account service charges, the bank may consider, but is not limited to considering:**

(1) <u>Costs incurred by the bank</u>, plus a profit margin, <u>in providing the service</u>;

(2) The deterrence of misuse by customers of banking services;

(3) The enhancement of the competitive position of the bank in accord with the bank's marketing strategy;

(4) Maintenance of the safety and soundness of the institution.

Each bank was further asked to produce any documentation which supported its response to this interrogatory. Simply mirroring the language of the CFR, each bank conveniently offered as its answer that the price was simply set high so as to deter the writing of NSF checks and to maintain the soundness of the institution. No bank was able to explain how it came up with its specific NSF price so as to achieve its purpose. Instead, one is to believe that all the banks just so happened to **independently** determine that the same price at each bank would be the proper NSF price which would successfully deter NSF check writing for their particular customers and likewise to protect the safety of their particular bank. Moreover, not even one bank produced any document whatsoever to substantiate the manner in which it had made its pricing decision.

Despite these answers being obviously blatantly pretextual, both of the lower courts used these answers for the entire justification of their decisions in holding that the banks had an equally plausible explanation to show that they came up with their prices through an independent decision process![7] However, in doing so, as will be explained in detail infra, the courts **ignored** the fact that plaintiffs presented valid evidence in the Record which showed that these reasons were totally **pretextual**, and thus, totally improper to be relied upon as a basis for granting summary judgment, when a **genuine issue** of **material** fact as to the legitimacy of such explanations clearly existed on the Record!

Since all of the banks' answer to this Interrogatory were woefully inadequate, counsel for Petitioners filed a "Motion to Compel" to get more complete answers to same.[8] The banks then filed motions for summary judgment. In support thereof, each bank filed an affidavit from a bank employee who was said to be involved in their bank's process of setting NSF prices and who claimed that

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[7] See Sixth Circuit opinion, Appendix pages 8 and 9; District Court opinion, Appendix page 15, 18, footnotes 17, 9 and 10.

[8] Resolution of this motion was still pending when the district court ruled on the banks' motions for summary judgment. Counsel for Petitioners, however, stipulated that the court could nonetheless go ahead and rule on the motion for summary judgment despite the pending motion to compel because counsel believed the trial court would properly apply the law on summary judgment and deny defendants' motion, whereupon meaningful discovery would finally begin, more than two years after the filing of the Complaint. Instead, the trial court erroneously applied the ambiguous standards set forth in Matsushita which were to be limited to cases where, unlike the present case, there is no logical motive to conspire.

their bank did not set the price in any relation to the bank's processing cost but instead as a result of the many market factors listed in the CFR in general and specifically, that the price was derived with the main goals of (1) their desire to deter the writing of NSF checks in the first place and (2) to maintain the safety and soundness of the institution, again lifted straight from this CFR.

The plaintiffs presented evidence into the Record which showed unequivocally that both of these explanations were **entirely pretextual**, and moreover, false. The proof is that a) the **number** of NSF checks has instead **increased** each year despite the raising of NSF prices, b) the banks have looked for ways to **intentionally** increase the number of checks they can classify as NSF rather than to try to decrease same, c) none of the banks have ever correlated NSF checks to the safety of the institution because the bank does not pay the NSF check in overdraft except for their very few, select, well-to-do customers, and d) despite claiming in their affidavits that they do not want NSF customers and threaten to close the accounts of such customers who write NSF checks, none of the defendant banks was willing to claim under oath that they have ever done so. In fact, the five persons who were deposed even admitted that they could not recall their bank ever having closed the account of a customer who wrote NSF checks; this was obviously because the NSF check writer represents a gold-mine to the bank.[9] This proof fell on deaf ears as both lower courts totally ignored same and instead found that the defendants had "proved" just the opposite and thus used same as the bases for their holdings!

Plaintiffs further met the motion for summary judgment with evidence (1) of uniform NSF pricing by the banks, (2) that said prices were many, many times in excess of their cost of processing NSF checks, thereby constituting a **strong motive** to keep said NSF charges high and uniform because the banks **realized enormous profits** from each such charge, (3) that the banks regularly monitor each others' fees and consider such amount charged by the other banks in setting their own fees, and (4) the affidavits of highly-qualified experts - Antonio Zate and Allen Buckalew[10] - expressing the opinions that **it would be impossible for the banks to maintain the substantial differential between cost and price in our American free market system without tacit collusion** among the banks **not to engage in competition**.

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[9] On this subject, see the brief excerpt from a magazine article found infra, page .

[10] These are both reprinted as part of the Appendix due to the importance of the contents of their expert opinions as to the issue of whether a genuine issue of material fact was established so as to defeat summary judgment.

To counter the claim by the banks that they maintain very high (in relation to cost) fees in order to deter the writing of NSF checks (and thus maintain the soundness of the institution), plaintiffs presented the deposition and affidavit of a former employee of one defendant bank, Raymond Shields, stating that the bank, First Tennessee, had changed its procedure for processing checks not with a desire to deter NSF checks but to the total contrary, **with the express objective of doubling** the daily number of NSF checks and had instructed its employees not to advise customers of this change. Petitioners further offered evidence that each of the other banks had likewise followed suit to engage in this practice, which in quick time, had become the industry standard.

The plaintiffs also placed in the Record deposition testimony[11] from the bank affiants **which directly contradicted their own affidavits** in that at deposition, they **admitted** either a) that their banks did nothing to determine if an increase in NSF charges would help to deter the writing of NSF checks or b) that deterrence was not even a factor in the setting of their NSF prices; and further admitted that they had never taken any steps to try to assist customers in reducing the number of NSF checks. All this "evidence" completely showed the **falsity, or pretextual nature**, of the banks' allegation that they raised prices in order to deter and decrease the number of NSF checks in the banking system. Unlike most cases where discovery is completed before summary judgment is ruled upon, summary judgment was granted in the present case before any meaningful discovery had even begun.[12]

Against this backdrop, the district court found sufficient evidence of uniform pricing to make out a prima facie case under the Sherman Act[13] but ruled that the banks' explanation for their artificially high prices was legally sufficient under Matsushita to entitle them to summary judgment. Despite the **clear contradictions**

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11 Due to their importance, brief excerpts from these depositions are reprinted beginning at page 16, infra.

12 As stated, plaintiffs' motion to compel answers to interrogatories and requests was pending. In the meantime, plaintiffs' counsel deposed only five affiants employed by the defendants, during which depositions, counsel for defendants objected to much of the questions therein. Counsel did agree to the stipulation that the court could rule on defendants' motion for summary judgment even though this discovery dispute was still pending because he thought the law was clear that in light of the posture which the case stood at the time, summary judgment was clearly inappropriate.

13 See District Court's *Order Granting Summary Judgment*, page 13 of the Appendix.

on **genuinely material facts** on the face of the Record which have been set forth above, the district court nonetheless granted summary judgment on the bases that the court could accept as true the banks' contention that they had acted to set their NSF prices so high for the purpose of deterring the writing of NSF checks and to protect the safety of the institution, even though the proof is overwhelming that such contention was **conclusory and pretextual**! The Sixth Circuit panel decision affirmed the lower court and **likewise used this identical bases** as the rationale and foundation of its opinion!

Thus, the lower courts held that the banks were entitled to summary judgment regardless that the bank's theory for explaining their pricing practices, to deter NSF checks, was **exactly the opposite** of what the facts showed to be **actual** market behavior. **In sum**, Petitioners submit that the lower courts totally ignored this Court's decision in Eastman Kodak Co. v. Image Technical Services, Inc. where the Court held that summary judgment was premature in a factual situation which is **completely analogous** to the facts herein. Second, the lower courts not only erroneously interpreted this Court's decision in Matsushita Elec. Indus. Co. v. Zenith Radio Corp. as even being applicable to the facts herein in the first instance, but for argument's sake, **even if the strict tests set forth in Matsushita were applicable**, the defendants were still not entitled to summary judgment thereunder.

REASONS FOR ALLOWING THE WRIT

The decision of the lower courts is **totally in conflict with** this Court's last two decisions concerning the standard for summary judgment in an **antitrust controversy**, that is, Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992) and the case which Eastman Kodak attempted to clarify, Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). Simply put, the Sixth Circuit Court of Appeals has decided an important federal question of **immense public importance** in a way that directly conflicts with applicable decisions of this Court and allows an enormous injustice to perpetuate unguarded.

Neither lower court even mentions this Court's holding in Eastman Kodak in their decision. Instead, both courts' rulings simply ignore this Court's reasoning therein that the holding and the test set forth in Matsushita applies only to the limited situation where the plaintiffs' theory of price-fixing makes no practical or economic sense and is so "speculative" that it would be unreasonable for the ultimate trier of fact to assume that it has any chance of succeeding; only in such situations can a court hold that, as a matter of law, a reasonable jury could not return a verdict for the plaintiffs. The Sixth Circuit erroneously held that the limited test set forth in Matsushita applied to the facts herein when Eastman Kodak, in a

situation **totally analogous to the facts herein**, clearly expressed that it did not. The all-important difference between this case and Matsushita is that here, Petitioners' alleged theory of conspiracy makes profound economic sense.

Given this grave error, this Court should furthermore grant the writ because this appeal involves a question of **exceptional and extraordinary** far-reaching, public importance. The price-fixing issue involved in this case represents the number one consumer complaint against banks nationwide, not just Tennessee. It is hard, **and perhaps impossible, to conceive of a case that is more worthy of this Court's time in review than the present case**. It can not be over-exaggerated to say that this is a case of tremendous importance with **as much far-reaching public implication as perhaps any consumer-rights case this Court has heard in the past decade**.

This Court's refusal to grant permission to appeal and to thereby reverse the lower court has even greater implications than just the present lawsuit. The banking industry is all too smart to ever be caught directly conspiring with each other to set prices, especially when the success of their scheme does not require it. Thus, the lower court's analysis of how to apply the circumstantial proof to summary judgment leaves the banks totally free to charge whatever they desire. This position will ultimately lead to the banks' raising their NSF fee to $100, $200 ad infinitum whenever they desire, if the judicial branch of this country does not step in to protect the consumer. If the banks did raise the NSF charge to $200 tomorrow, would there be any hesitation that this Court would then decide to exercise its authority to review the lower courts' opinions? Perhaps $20, as opposed to $200, does not sound like much when viewed in isolation. However, a mathematical mistake, which is the cause of most NSF checks, is something that happens, at some time or another, to a great number of regular checking account customers, and when it does, it usually results in batches of checks being bounced, resulting in NSF charges of perhaps $50-100. To the average Tennessee citizen, many of whom are on government welfare or other forms of fixed income, even a $20 charge typically means that they will not be able to provide food or other necessities for their children that month or week. Although the bank does not care about such injustices, certainly this Court must!

Based on the amount of money involved, approximately $100 **million** charged for NSF checks annually in Tennessee alone and over $4.5 **billion** annually nationwide, it is probably the single most important consumer protection cause pending in **all the courts of this great country**. This is further because the ruling herein not only will directly affect **hundreds of thousands** of Tennesseans who qualify to be reimbursed for their damages as class members, but literally, will likely directly affect many **millions** of consumers nationwide who are annually gouged by the banking industry via the assessment of this NSF/DIR charge.

It is respectfully submitted that this is the entire purpose of having a High Court of last resort, to hear matters of **such extreme public importance** and decide with a reasoned opinion whether the lower courts have indeed applied the law correctly in a case of such magnitude.

Still further, as evidenced by the Headline article in the "Money" section in the September 8, 1995 issue of USA TODAY,[14] the Justice Department of our federal government feels that price fixing is a most important issue to be on the agenda of our country's interest. As this case deals with damages to the American public far, far greatly in excess of the $15 million in damages settled upon in the case therein reported, it is certainly worthy of this Court's valuable and limited time.

ARGUMENT

1. The Sixth Circuit (and the district court) herein made the identical error in its analysis of Matsushita which the district court made in Eastman Kodak Co. v. Image Technical Services, Inc.

In analyzing the facts herein, the Sixth Circuit ignored this Court's reasoning set forth in Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992) and instead erroneously held that the test set forth in Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) was to be used as the standard for summary judgment in **any** antitrust controversy founded on circumstantial evidence. In effect, the Sixth Circuit concluded that under Matsushita, the defendants who are accused with circumstantial evidence of conspiring to fix prices in violation of the Sherman Act are entitled to summary judgment **simply by offering any theory** which appears legitimate on its face to explain their practice and that such theory need not be tested for its truthfulness.

However, this Court held **exactly to the contrary** in affirming the appellate court's reversal of the district court's grant of summary judgment in Eastman Kodak, a case with facts most analogous to the facts herein. In Eastman Kodak, this Court emphasized that the holding in Matsushita was to be applied to the **very limited** fact situation appearing therein, **where the plaintiff's theory of price fixing is speculative and makes no economic sense**, and not to be used as the standard in all price fixing cases founded upon tacit collusion.

> *Kodak* analogizes this case to *Matsushita* where a group of American corporations that manufactured or sold consumer electronic products

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[14] attached hereto as part of the Appendix, page 34.

alleged that their 21 Japanese counterparts were engaging in a 20-year conspiracy to price below cost in the United States in the hope of expanding their market share sometime in the future. After several years of detailed discovery, the defendants moved for summary judgment. Id., at 577-582. **Because the defendants had every incentive not to engage in the alleged conduct which required them to sustain losses for decades with no foreseeable profits, the Court found an "absence of any rational motive to conspire."** Id., at 597. **In that context, the Court determined that the plaintiffs' theory of predatory pricing makes no practical sense, was "speculative" and was not "reasonable."** Id., at 588, 590, 593, 595, 597. Accordingly, the Court held that a **reasonable jury could not** return a verdict for the plaintiffs and that summary judgment would be appropriate against them unless they came forward with more persuasive evidence to support their theory. Id., at 587-588, 595-598.

The Court's requirement in *Matsushita* that the plaintiffs' claims make economic sense did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases. The Court did not hold that if the moving party enunciates any economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment. *Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision. If the plaintiff's theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted.

Kodak, then, bears a substantial burden in showing that it is entitled to summary judgment. It must show that despite evidence of increased prices and excluded competition, an inference of market power is unreasonable. (Emphasis added).

Eastman Kodak, 504 U.S. at 467. As the dissent[15] pointed out in Matsushita, the lower courts herein have attempted to overturn existing law by giving the trial judge hearing a motion for summary judgment the power to determine if the evidence makes the inference

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15 Justices White, Brennan, Blackmun, and Stevens.

of conspiracy more probable than not. To do so goes beyond the traditional inquiry and allows the judge to decide for herself whether the weight of the evidence favors one of the parties. This Matsushita dissent criticized the majority for using unnecessary broad and confusing language that could be construed in such a way. Eastman Kodak then came along and further clarified that the lower court was in error in reading Matsushita in this way. Now, four years later, it is obvious necessary for this Court to further clarify this for the lower courts. The facts of this case present the Court with the opportunity to permanently clear up any confusion as to the standard for reviewing summary judgment in an antitrust case based on circumstantial evidence which still lingers from the Matsushita ruling.

In the present case, just as in Kodak, the plaintiffs' theory of why the banks are engaging in collusion **makes strong economic sense**, one which **any** reasonable jury could find in plaintiffs' favor. However, neither lower court even mentioned the reasoning in Eastman Kodak, instead reaching decisions that are totally in conflict therewith. Here, like Eastman Kodak, the inference of price fixing is certainly reasonable and having thus raised a genuine issue of material fact, the banks were not entitled to summary judgment.

*2. The facts in the present case are critically distinguishable from the material facts in Matsushita because there is present here an **overwhelming plausible** motive for the banks to conspire under plaintiffs' alleged conspiracy, which motive the Court found **lacking** in Matsushita.*

Here, both the district court and the Sixth Circuit interpreted Matsushita erroneously to hold that since the banks filed affidavits stating that they keep their prices high to deter the writing of NSF checks, which would appear on its face to be a logical goal, they are entitled to summary judgment. Assuming for argument's sake that the Matsushita test applied to the facts herein, the Sixth Circuit's ruling was nonetheless in error because Petitioners presented strong evidence that raised a genuine issue of material fact as to whether the banks' tendered explanation for their actions was pretextual. Plaintiffs presented proof that, to the contrary, the banks engage in intentional efforts to increase the number of checks that they can legally classify as NSF and therefore reap these enormous profits. Thus, even under Matsushita, the court should have thus allowed the case to go to the jury to decide factually whether the banks' pricing practices were in truth intended to deter the writing of NSF checks.

Perhaps the Sixth Circuit's confusion lay in that this appears to be the first case in which such circuit has applied the summary judgment standards set forth in Matsushita to a claim of tacit conspiracy to **fix prices** in violation of Section I of the Sherman

Act. As seen infra,[16] the other Circuits which have applied the Matsushita standards to cases where, as here, the plaintiff has shown a plausible economic motive to partake in the conspiracy have all reversed the granting of summary judgment. The antitrust cases in which the Sixth Circuit has previously applied the Matsushita standards have either not involved summary judgment or have not presented price-fixing claims. See Riverview Investments v. Otowa Community Improvements, 899 F.2d 474 (6th Cir. 1990), cert. denied, 498 U.S. 855 (1990); and Nurse Midwifery Associates v. Hibbett, 918 F.2d 605 (6th Cir. 1990), both of which were brought under the Sherman Act alleging a conspiracy in unreasonable restraint of trade as opposed to price fixing. Both Matsushita and Riverview admittedly relaxed the standards of summary judgment in antitrust cases in certain fact situation not present here. However, neither held that the defendants may prevail on summary judgment (a) without a reasonably showing of the veracity of the reasons which they tender to support an inference that their prices were set through independent action and (b) certainly never when a ruling would require the trial judge to make a finding of credibility on hotly disputed issues of material facts which would allow a reasonable jury to find for the nonmovant, a task traditionally left to the jury.

The Sixth Circuit held that the disposition of this case turns on the proper application to the Record of this Court's admonition in Matsushita that "antitrust law limits the range of permissible inferences from ambiguous evidence in a §1 [Sherman Act] case". 475 U.S. at 587. The Sixth Circuit affirmed the summary judgment granted by the district court because it erroneously determined that the plaintiffs' evidence of conspiracy was "ambiguous" because it held that applying the criteria set out in Matsushita, the evidence was as consistent with the defendants' permissible independent interest as with an illegal conspiracy and was thus "ambiguous". However, Matsushita dealt with a predatory pricing scheme where the inference of price fixing was correctly held to be highly ambiguous. That is simply not analogous to the situation herein, where nothing is ambiguous. Instead, contrary to plaintiff's theory of collusion in Matsushita, it makes all the sense in the world for a bank to try to maintain a price of $19 on a transaction that costs it $1 to handle! Therefore, even the Matsushita majority would have to hold herein that Petitioner's inference of collusion among the banks is certainly not ambiguous.

In reaching these conclusions, the Court of Appeals made two fundamental errors. First, it improperly interpreted Matsushita in finding that the evidence of conspiracy presented by the plaintiffs in this case is "ambiguous" for purposes of where this case stood

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[16] see discussion beginning at page 21.

procedurally when the motion for summary judgment was ruled upon. The majority in Matsushita made it clear that evidence of **uniform pricing** can be ruled "ambiguous" as a matter of law by the trial court **only** when the defendants **have no motive to conspire**. In Matsushita, this Court determined that a conspiracy to maintain **artificially low** prices through a predatory scheme was **economically implausible** and, **therefore,** the defendants had **no motive** to conspire which could be presumed through inference.

However, the defendant in Matsushita was not entitled to summary judgment simply because it denied under oath that it conspired, **which in essence is all the banks have done here**. Instead, the explanation offered by the plaintiffs in Matsushita to support an inference of a predatory-pricing conspiracy was so far-fetched and had failed to succeed for over two decades that the Court found it to be plainly **"implausible"** as a "matter of law." Id. at 576. In light of this "ambiguous" evidence of conspiracy, the Court refused to **infer** illegal price fixing **from uniform prices alone** and required the plaintiffs to present evidence that **tended to excluded the possibility** that the defendants had acted out of permissible independent interest.

Here, however, the facts are in no way analogous to Matsushita. Instead, Petitioners have presented a simple-to-understand and **overwhelming motive to conspire** which explains why the conspiracy is **economically plausible**, or perhaps better put, **compelling** to engage in. Accordingly, the Court of Appeals **improperly** treated the evidence of conspiracy herein **as ambiguous** and **unnecessarily limited the inferences** that could be drawn from such evidence.

Second, the panel granted summary judgement **even though a genuine hotly contested issue of material fact** existed as to the issue of whether the banks honestly do set NSF prices substantially in excess of their processing costs **for purposes of deterring** the writing of such checks - their **alleged** "permissible independent interest." Where such genuine issue exists, even Matsushita does not authorize a district court to resolve it by resort to weighing **plausible** affidavit or other sworn testimony, **even in an antitrust case**. Eastman Kodak makes this all too clear, a case whose ruling the lower courts here somehow ignored! Instead, as clarified in Eastman Kodak, the evidence of the nonmoving party **must be believed** and all justifiable inferences must be drawn in his favor. As stated in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986), "the judge's function is **not himself to weigh the evidence and determine the truth** of the matter but to determine whether there is a genuine issue for trial." Id., 477 U.S. 242, 249 (1986).

But that is exactly what has occurred here! As the basis for their decision, the Court of Appeals and the district court both accepted the **totally conclusory** statements of the banks' affiants that the NSF charges have been maintained substantially in excess of the

cost of processing NSF checks for the purposes of deterring the writing thereof. For example, the Sixth Circuit stated that:

> It is clear from the affidavits submitted by the Banks that they do in fact take many legitimate factors into account besides costs. Several of the Banks submitted affidavits stating that they established high prices for NSF checks because they did not want to attract customers who write these checks and wanted to deter customers from this behavior. One bank stated that it set NSF fees based on "what the market is charging, government regulations, and business judgment." Another bank considers profitability, handling and processing costs, competitive position, and the maintenance of safety and soundness.

Appendix, page 6. Similar, the district court stated:

> Plaintiffs fail to point out, however, how this evidence tends to exclude the possibility that the banks acted independently and set the fees in order to deter misuse of bank services.[17] The evidence of this economic motive to conspire is as consistent with the view that fees are set high and in the same range because banks seek to deter this conduct.

Appendix, page 15, 18.

The error in relying on such explanation to support granting summary judgment is that the Petitioners strongly challenge the veracity of such contentions, thereby raising a genuine issue of fact as to this most critical issue. Nonetheless, the lower courts accepted same as gospel even though the banks had **not placed into the Record even one document to substantiate these bare conclusory contentions**. Instead, as urged by Petitioners, if that was the banks' **true** goal, they would have certainly generated studies or surveys to show that they were accomplishing their purpose and would have unquestionably made such documents **a part of the official Record**.

For example, if First Tennessee Bank raised its fee from $10 to $15 in 1985 and then to $19 in 1988 with the intention of deterring customers, that is, of decreasing the average daily volume of NSF checks, they would certainly possess records which indisputably showed that the number of NSF checks being processed daily **indeed decreased** following each such change. Although there

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[17] Plaintiffs attempt to challenge this explanation by claiming that it is a fallacy due to the lack of surveys to determine the degree of deterrence, the fees do not deter customers because writing bad checks is unintentional conduct, and the banks do not actually wish to deter this practice. Plaintiffs fail to support these contentions with any evidence.

are nine banks in this lawsuit that have each progressively raised their NSF fees from $3 to the present $19 charge over the past fifteen years in $3 to $5 increments, none has ever either a) surveyed its customers **prospectively** to determine if the increase could be expected to better deter NSF checks or b) analyzed the fee increases **retrospectively** to ascertain the **actual** effect of fee increases on the number of NSF checks written. The Record is totally devoid of any **such documents** to substantiate these bare contentions. And it would seem logical further that if the bank was truly indeed trying to decrease the number of NSF checks so as to thereby **strengthen the safety and soundness of the banks** - as they so claim and as the Court of Appeals likewise accepted as the second basis for its holding - and found that their increases were not accomplishing this goal, they would obviously keep increasing the NSF charge until they so succeeded! Ditto, no bank has ever filed any such study or document data that would substantiate that this was ever a concern of the bank so far as NSF checks are concerned.

Even further, on cross examination at deposition, when the defendants' affiants[18] were questioned as to how their banks set its NSF charge so as to deter the writing of NSF checks and maintain the safety of the institution, some went so far as to **totally contradict their very own affidavit testimony, candidly admitting that such charges were in fact not even designed to have the deterrent effect which had been previously claimed in the affidavits drafted by their attorney**! Just as the lower courts both ignored this Court's holding in Eastman Kodak, they likewise totally ignored this deposition testimony. Because this testimony is so crucial, select portions are reprinted immediately below, preceded by a summary of the select testimony:[19]

1. Mr. Walter Howell, an officer of NBC, testified in his October 18, 1993 deposition that 1) he could obtain the daily volume of NSF checks being handled by his bank "real quick", 2) that the bank did not wish to deter the writing of NSF checks when it sets its NSF price, 3) that the bank had done no surveys to determine the correlation between the NSF charge and any deterrence effect, nor had it ever offered customers any assistance or education to help

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[18] Plaintiffs were able to depose only five such affiants or bank officers prior to submitting their Response to defendants' motion. All show unanimously that there was no truth at all to the contents of their affidavits as to the reasons for setting NSF charges so high.

[19] The following testimony is taken from those persons who submitted affidavits on behalf of the banks' motion and who were listed in "answers to interrogatories" as persons whose duties included involvement in the setting of NSF prices at their respective bank.

decrease their writing NSF checks, and 4) refused to answer whether the bank had any policy of closing accounts for writing NSF checks:

> (Page 44: Line 7) Q. Mr. Howell, . . . how hard would it be for you to go to somebody at the bank and said, tell me how many NSF checks we processed last night? A. I could probably find out. Q. Real quick, couldn't you? A. Uh-huh.
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> Page 55, Line 9: Q. Now, Number 2, I asked you about the deterrence of misuse by customers of banking service. You told me you all do consider that. For example, when you raised it from eighteen to nineteen back in 1989, I assume that you looked at the deterrence of misuse by customers of the banking services and decided, hey, that's one of the reasons we've got to raise it from eighteen to nineteen dollars? A. As relates to NSF charges, I can't say necessarily that that would have been one of the reasons. Let's get down to Number 3. Q. Wait a minute. Let me ask you this: Has NBC DONE ANY SURVEYS that you know of that show that people misuse their checking account on the basis of how much their NSF charge is? A. Misuse their checking account? No. I (Page 56) don't know of any surveys. Q. You've done no surveys? A. No. Q. You also don't have any cost surveys as to how much it costs you to process an NSF check? A. That's correct. Q. The truth of the matter is that the NBC doesn't really use Number 2 (the deterrence of misuse by customers of banking services), even, do they? A. They could or couldn't. I think that is rather subjective. Q. Okay. A. Number 3. Q. Let me ask you this: Number 3, "The enhancement of the competitive position of the bank in accord with the bank's marketing strategy." Does NBC look at Number 3? . . . Do you think it enhances the banks's competitive position when you raise your price from eighteen to nineteen dollars? A. Probably not, but again, that's one of a number of factors. . . Page 58 Q. (BY MR. THOMAS) HAVE YOU DONE ANY SURVEYS to show if people write NSF checks intentionally? A. No. Q. Has the bank done -- had any programs they have ever offered to the public -- I mean the bank, NBC, to help people decrease the number of NSF checks they write? A. Off the top of my head, I can't recollect.

> Page 65: Line 13) Q. (BY MR. THOMAS) Mr. Howell, let's go back to that regular meeting in 1989 among the people that were responsible for setting NSF charges. You all decided to change it from eighteen to nineteen. First of all, could you give us a copy of all the SURVEYS that NBC did to decide how the public would react to the change from eighteen to nineteen? A. No. Q. You didn't do such a survey? A. I think we said factors including, but not limited to, the charges that are charged and how the public would react to the charges. (Page 66) Q. So when you all raised it from eighteen to nineteen, you didn't do any SURVEYS to how the public would react to the charges? A. I would be fairly confident we did no surveys. . . . Q. How many times in your employment with NBC have you ever seen a survey go out where you ask the customer what you think about us raising our NSF charge? A. I can truthfully say I'm not aware of such a question in a survey.
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> Page 73, Line 6: Q. How many customers' accounts have you closed -- well, does NBC have a policy of closing customer's accounts once they reach a certain number of NSF checks? MR. GLANKLER: I instruct you not to answer. We've not only wandered off the reservation, we've joined another tribe now. I'm going to have to keep us back on track here.

2. Mr. Thomas Garrott, chairman, president, and CEO of Defendant National Commerce Bank Corporation, testified in his November 4, 1993 deposition that he had never even given the thought of wanting to reduce the volume of NSF checks any consideration, and further, that his bank did not have a policy of closing the accounts of customers for writing NSF checks (Mr. Garrott's full deposition is at Entry 198 of the Record and the excerpts begin at page 819 of the Joint Appendix):

> Page 26, Line 22: Q. . . Is it your position as the head officer of NBC that you would like to see the numbers of NSF checks that are written by your customers (Page 27) decreased? MR. GLANKLER: If you have a position. A. I've not given it any thought. Q. (BY MR. THOMAS) Are you familiar with any policy of NBC with regard to closing accounts of customers who write NSF checks? A. No.

3. Ms. Susan Stephenson, the affiant for defendant Boatman's, was deposed on November 29, 1993. After rambling on and on because she was unable to give any intelligible explanation as to

how her bank uses the factors set forth in her affidavit in setting its NSF price, she likewise admits that she has no statistical data or any SURVEYS whatsoever for this Court to have relied upon as a basis for ruling that the banks' purpose in setting high NSF prices is to have a deterrent effect on customers (Ms. Stephenson's full deposition is at Entry 251 of the Record and the excerpts begin at page 1024 of the Joint Appendix):

> Page 12, Line 4: Q. (BY MR. THOMAS) Now, Ms. Stephenson, you said that you are a member of a committee that consists of five people to set NSF charges. . . Page 20, Line 11: Q. Now, the next paragraph (of your affidavit) says "The determination of the charges to be assessed for NSF and DIR checks is an independent internal decision made by Boatmen's. . . .
> (Page 30: Line 2) Q. Let's go to the next one after the comma there. It says "Deterrence of misuse by customers." How does Boatmen's perceive and relate the NSF charge to the **deterrence of misuse** by customers? A. Part of the process of establishing an NSF charge is to deter customers from writing bad checks. Q. Are you aware of any **volume figures** of NSF checks **today versus** let's say **when you all were charging eighteen dollars**? A. **No, I'm not aware of any volume** numbers. Q. Do you think the volume has gone down, it has had a deterrent effect by raising it to twenty dollars? A. To be **honest, I don't know**. **I don't have any factual basis for this. It would be supposition for me to say yes, it has or no, it has not**. . . (Page 31: Line 5) Q. (BY MR. THOMAS) Has the committee ever discussed raising it to such a high figure, such as fifty dollars, to deter customers? A. No, we've never discussed that. Q. Does the bank have any studies that show and relate the deterrent effect of the NSF charge to how many NSF checks are written? A. I do not know of any **surveys** that we have, no.
> Page 34, Line 13: Q. You can't look at that twenty dollars and say, well, X number dollars, we'll just say five, we'll use that for an example, you can't say, for example, five dollars of that twenty is for the deterrence of misuse by customers? **There was no such educated process** to go about that? A. No, no. . . . (Page 35, Line 5) Q. (BY MR. THOMAS) Ms. Stephenson, use my example again. Is there any way you can look at that twenty-dollar figure and

allocate any specific amount or general specific amount to one of these factors such as I picked the deterrence effect, such as, for example, five dollars of our twenty was we figured that five dollars of that was for the **deterrence effect**? A. No.

4. Ms. Anna Greehan, the affiant for First TN, was deposed on November 10th, 1993 and likewise admitted that there were no documents to justify any contention that the NSF prices had a deterrent effect or were intended for same, nor did her bank close a customer's account for writing NSF checks (Ms. Greehan's full deposition is at Entry 204 of the Record and the excerpts begin at page 834 of the Joint Appendix):

> (Page 37: Line 4) MR. THOMAS: Turn to page two of her affidavit for her. Q. (BY MR. THOMAS) . . .(Page 38, Line 12) Q. Now, Number 4, "First Tennessee Bank sets NSF fees on a region-by-region basis based on a variety of considerations and factors." Please tell us all the variety of considerations and factors which you meant when you wrote that when you signed that affidavit? A. Well, that varies by region, but consumer reaction, what's going on in the market, our perception, our perception in that market, our discussions with customers in that market, **what other banks are charging**. **That's about it.** . . . (Page 39, Line 3) Q. (BY MR. THOMAS) Let's start with the consumer reaction factor. Tell me all the **studies** that you have participated in at First Tennessee to see what consumer reaction is to the NSF charges. A. We haven't undertaken any. Q. Then what did you mean when you said "consumer reaction"? A. I meant a general feel about how consumers feel about service charges in a particular market. Q. Can you furnish for us **all the studies** that you all have done, that First Tennessee has done, to show how consumers feel about NSF charges? A. There **haven't been any.** Q. Ms. Grehan, I don't want to argue with you. I want you to explain to me, then, you know, what you did in terms of consumer reaction. . . (Page 47: Line 25) A. I don't think they care. (Page 48) Q. Well, why do you answer it like that? A. **From my experience, consumers don't seem to care about fees like that. They assume that they are not going to write -- your average customer is not going to write an insufficient check.** Q. Have you done any STUDIES to see what

the consumer reaction would be, for example, if you raised it to twenty-five dollars? A. No.
Page 57, Line 11: Q. Now, factor number two says, "The deterrence of misuse by customers of banking services." . . . (Line 22) do you know in what manner the bank factors in the deterrence of misuse by customers of banking services when they set their NSF fees? A. No. (Page 58) Q. Have you seen any studies that show how the price itself relates to the -- how the price that is charged for the NSF relates to the number of NSF checks that are written historically? MR. SPEER: Are you talking about -- am I confused about deterrence? Q. (BY MR. THOMAS) Have you seen any studies that First Tennessee has done that has shown that they raised their NSF charges to deter or lower the number of NSF checks written? A. No. Q. Have you seen any studies that show whether there has been a decrease in the volume of NSF checks written at First Tennessee since the charge was raised from eighteen to nineteen dollars? A. No. Q. From a marketing strategy, do you think that that has had an effect of decreasing the number of NSF checks, that the increase from eighteen to nineteen would have that effect based on your marketing experience? A. No. (Page 60; Line 14) Q. And how does the price of the NSF affect the safety and soundness of the institution? A. Just from a personal perception, that we don't want a lot of checks that are insufficient. Q. Does First Tennessee have any type of policy that they close accounts based on the number of NSF checks that have been written on that account? A. No. Q. You've been here five years. Tell me how many times have you ever heard of First Tennessee closing an account because the person wrote too (Page 61) many NSF checks? A. I've never heard of an instance. . . Page 70, Line 18: Q. And you have never, in answering how you would feel, you have never been able to refer to any studies that show, you know, how the public feels? This is all just your personal reaction? A. That's correct.

5. Mr. John Hamilton, an officer of First TN, like the others above, testified in his October 19, 1993 deposition that he had no data to support the banks' conclusory contention that NSF checks undermine the safety of the banks' finances. More shocking, he most candidly admitted that the bank did not have any intention of

deterring the writing of NSF checks when setting such prices and had not engaged in any steps to assist customers in decreasing the number of NSF checks (Mr. Hamilton's full deposition is at Entry 250 of the Record and the excerpts begin at page 996 of the Joint Appendix).

> Page 13, Line 11: Q. Okay. Has First Tennessee ever done a marketing survey that asked any of their customers what they think about increasing the NSF charges? A. I'm not aware of any. Page 20, Line 5: Q. Are you aware of First Tennessee ever putting out any customer survey forms to be answered with any, you know, connection to service charges, the DIR and the NSF service charges? A. No. Q. What about mailing out any in their monthly statements? A. Surveys, no. . . . (Page 26: Line 11) Q. (BY MR. THOMAS) Have you gotten any **statistics -- not statistics, actual figures** that you can give us, a round figure, of what percentage of NSF checks First Tennessee pays in overdraft? . . (Line 20) By overdraft, I'm referring to a check that even though the customer doesn't have sufficient funds, the bank goes ahead and pays it. . . What percentage on a daily basis or weekly (Page 27) basis of NSF checks that First Tennessee processes, what percentage of them do they pay in overdraft? A. I don't know. . . Page 30, Line 5: Q. Do you know how many -- the average daily number of NSF checks? And I know it varies from day, but let's take an average daily. The last figures you've seen, what is the average number of daily NSF checks that First Tennessee processes a day? A. I don't know. I don't see that number. . . Page 32, Line 10: Q. Okay. Let's look at Number 2 there, one of these factors that you may consider but you are not obligated to. It says, "The deterrence of misuse by customers of banking services." Did you consider that factor when you set your price from eighteen to nineteen? A. No. Q. What do you understand that to mean? Not from a legal basis, but what do you understand that to mean in terms of your role as a manager? A. The statement is if there is a banking activity that we did not want to ever occur, that certainly would give us the ability to use pricing as **some type of deterrence**. That's my what that statement is trying to tell me. Q. Is the goal of the NSF charge at First Tennessee set so as to hopefully make it where no one bounces -- writes an

NSF check? A. No. . . (Page 39; Line 19) Q. Have you ever seen any SURVEYS that NSF checks -- the number of NSF checks are related to the price that the bank is charging to process them? A. No. . . Page 50, Line 2; Q. Tell me all the programs that you are aware of that First Tennessee has participated in in the last five years to assist customers in writing fewer NSF checks? I mean programs, seminars, one day, a few hours, where First Tennessee advertises a program or a seminar for people, the general public, to attend to assist them in decreasing NSF checks. A. I don't recall any.

Equally significant, Petitioners filed the affidavit of Raymond Shields, a former employee of First Tennessee Bank. This affidavit alone squarely placed the deterrence issue in dispute. As for the banks' pretextual contention that they do not desire NSF checks in the banking stream because they can affect the safety and soundness of the bank, Shields states that First Tennessee changed its method of processing checks with the express purpose of doubling the daily number of checks which could be classified NSF so as to reap the fees generated thereby. As for deterrence, he further states that his superiors specifically instructed its employees not to share this information with the bank's customers. These are certainly not actions which a bank would take if it truly wanted to decrease the number of NSF checks generated. To the contrary, a bank would take steps to educate and help customers avoid writing such checks under the new procedures.[20] Mr. Shields' affidavit must be viewed in the light most favorable to the party opposing the motion. Matsushita at 587. Such facts squarely place the explanation of deterrence as a "permissible independent interest" in dispute for trial.

Still further, Petitioners would cite this Court to just one of the many banking industry magazine articles on the subject of ways to increase the number of checks that a bank can classify as NSF, again to show the falsity of defendants' contentions that they seek to deter such volume. Rather than lead to problems with the

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[20] At oral argument before the Sixth Circuit, counsel for the banks argued that this change in procedure, whereby checks are processed in amount from the highest to lowest, was instituted because customers want their "big ticket" items paid first, such as a home mortgage. **There is not one scintilla of evidence in the Record supporting such a statement, simply because it is not true.** Nevertheless, even assuming its accuracy, counsel's representation does not explain why the bank would instruct its employees not to advise customers of this change of procedure. Certainly if the bank wanted to deter the writing of NSF checks, it would advise its customers of any change in procedure the effect of which is to double the number of NSF checks generated per day.

soundness of the bank, such checks do nothing but boost profits enormously. In an article entitled **"Bounced Checks Boost Profits"** published in the March 1991 edition of a banking industry trade magazine called **"Savings Institutions"**, the writer comments:

> Seasoned programs' NSF fees exceed the total payroll of the entire deposit side of the business, both branches and back office. . . . NSF fees are yours for the taking. In the old days, perhaps, you could afford to spurn the customer who bounced checks. . . NSF fees across the entire base (of checking account customers) will average $38.80 per year, on an average of almost three NSF checks. Who bounces checks? NSF customers are not bag ladies, the unemployed or the working poor. They're college-educated professionals with good -- possibly erratic or seasonal -- incomes, time-demanding positions and enviable life styles. They're toiling away in the legal and accounting firms and advertising agencies, not standing in line at soup kitchens. . . . You can maximize your NSF fees by implementing or making improvements in the following five areas. . . . **Love your customers.** NSF customers provide hundreds of dollars in revenues. Instruct your staff to treat them as the **valued customers** they are. A sympathetic attitude can help collect NSF fees. Sympathy, of course, stops just short of waiving fees. NSF fees should virtually never be waived.

As this Court pointed out in **reversing** the Sixth Circuit's grant of summary judgment in the first appeal in Fortner Enterprises v. United States Steel Corp., 394 U.S. 495, 503, 22 L. Ed. 2d 495, 89 S. Ct. 1252 (1969), the movant in an antitrust case can not rest on its laurels by filing affidavits under oath when the factual contentions therein are opposed by equally reasonable affidavits submitted by the plaintiff. The test on summary judgment is not what may turn out at trial, that is, that the defendant may be able to ultimately prove on the merits that the arrangement complained of serves legitimate business purposes. The test under Fortner is whether on the Record before the court, it would be **impossible** for a reasonable jury to find for the plaintiffs as a matter of law. This Court there stated that it is not the trial court's function to speculate as to the ultimate findings of fact.

A genuine issue of material fact exists, therefore, regarding the existence of a "permissible independent interest" supporting the uniform pricing challenged here. **Properly applied**, even assuming that the stricter test laid down in Matsushita rather than that in Eastman Kodak applied to the facts herein, Matsushita would still require the **denial** of summary judgement under these circumstances.

This Court should, and indeed must, grant Petitioner's writ to again take the steps necessary to secure the proper application of the standard to be used by our trial courts in summary judgment in an antitrust case and thereby maintain the uniformity of the decision herein with that of this High Court in Eastman Kodak and Matsushita. This Court has not rendered a decision dealing with such an issue since it exercised its authority in the Eastman Kodak case in 1992. Obviously, the lower courts still needs additional guidance.

3. Both Eastman Kodak and Matsushita place great importance on the presence or lack of a motive to conspire in allowing summary judgment.

The simple way to summarize the opposite holdings in these two cases is that the charge of price fixing made **economic sense** in Eastman Kodak and vice versa in Matsushita. Thus, in holding that summary judgment was not justified in Eastman Kodak, this Court stated:

> We conclude, then, that Kodak has failed to demonstrate that **respondents' inference** of market power in the service and parts markets is **unreasonable**, and that, consequently, Kodak is entitled to summary judgment. It is clearly reasonable to infer that Kodak has market power to raise prices and drive out competition in the aftermarkets, since respondents offer direct evidence that Kodak did so. It is also plausible, as discussed above, to infer that Kodak chose to gain immediate profits by exerting that market power where locked-in customers, high information costs, and discriminatory pricing limited and perhaps eliminated any long-term loss. **Viewing the evidence in the light most favorable to respondents**, their allegations of market power "make . . . **economic sense.**" Cf. *Matsushita*, 475 U.S. at 587. (Emphasis added).

504 U.S. at 477.

It is imperative to keep in mind that Matsushita is a predatory pricing case. The plaintiffs claimed a conspiracy to fix and maintain low prices in American market for televisions sets with the objective of driving out competitors and then using the obtained monopoly power to raise prices in the absence of competitors. In that context, the Supreme Court established the following approach to evaluating summary judgment in antitrust cases where the evidence of conspiracy is "ambiguous":

> It follows from these settled principles that if the factual context renders respondents' claim **implausible**--if the claim is one that **simply makes no economic sense**--respondents must come forward

> with more persuasive evidence to support their claim than would otherwise be necessary. Cities Service is instructive. . . . Economic factors strongly suggested that the defendant had **no motive** to join the alleged conspiracy. 391 U.S., at 278-279. . . Since the defendant lacked any **rational motive** to join the alleged boycott, and since its refusal to deal was consistent with the defendant's independent interest, the refusal to deal could not by itself support a finding of antitrust liability. Id., at 280.
>
> . . . "[o]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). **But antitrust law limits the range of permissible inferences from ambiguous evidence in a §1 case.** Thus, in Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984), we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. Id., at 764. See also Cities Service, supra, at 280. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of §1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. (Emphasis added).

475 U.S. at 587.

Critical to understanding the guidelines set by Matsushita in the above quote is that as a threshold analysis, the Supreme Court first found that on the evidence before the trial court, the claim of conspiracy was **economically "implausible."** The Court observed that predatory pricing schemes as claimed by the plaintiffs there "are rarely tried, and even more rarely successful." Id. at 589. **As such, the Court determined that the defendants had no motive to conspire**. It was only after first finding this **implausibility** that the Court could **then** make a finding of "ambiguity." The analytical guidelines established by the majority in Matsushita (four justices dissented), **clearly turns on this finding of a lack of motive**.

> That being the case, the **absence of any plausible motive** to engage in the conduct charged is **highly relevant** to whether a "genuine issue for trial" exists within the meaning of Rule 56(e). **Lack of motive** bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if

> petitioners had **no rational economic motive** to conspire, **and** if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy. (Emphasis added).

Id. at 596. Most important, as the above quotation explains, the **limitation on permissible inferences** that "might be drawn" from evidence of uniform prices arises **because of** the lack of motive to conspire and the resulting implausibility of the explanation for conspiracy. **Only** under **those** circumstances must the plaintiffs tend to exclude the possibility that defendants priced independently for permissible reasons.

The Sixth Circuit's analysis herein directly contradicts the guidelines set even by the Matsushita majority. The **starting point** must be the **economic plausibility** of the conspiracy theory - whether the defendants **truly** have a **plausible motive** to conspire. If not, then evidence of uniform prices alone is ambiguous. Conversely, if there is a motive, the burden **shifts to the defendants** to establish - without creating any genuine issue of material fact - that they have set the uniform prices in furtherance of a permissible **independent** interest. The banks have failed to carry that burden as they have chosen instead to rely on **conclusory** affidavits that have been shown to be **clearly pretextual**.

On the other hand, following this analytical approach, the conspiracy posited by the Petitioners is **both plausible** and **supported by the proper evidence**. As to plausible motive, there exists a substantial differential between the cost of processing an NSF check and the fee charged to the customer for each such check. Thus, the banks realize **enormous** profits from these fees. The affidavits of plaintiffs' experts corroborate this motive to conspire. According to (expert) Allen Buckalew, the banks **absolutely could not** maintain the high differential between cost of processing and amount of the fee charged **absent tacit collusion**. (Expert) Antonio Zate concurs in this opinion and goes on to state that the banks had a further economic motive in the early 80s when the NSF fees began their steep increase, a desire to compensate for enormous losses in interest revenue that had been brought about by bad investment underwriting. Thus here, unlike Matsushita, there is abundant, **plausible** evidence of motive to conspire. As such, the evidence of conspiracy is not ambiguous and no basis exists for limiting the inferences to be drawn from uniform pricing.

Other circuits, in applying the Matsushita guidelines, have properly recognized that a **plausible motive** to conspire broadens the **permissible inferences** that a court may draw from evidence of anticompetitive conduct and precludes summary judgment. In Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc., 826 F.2d 1335 (3d Cir. 1987), the Third Circuit **reversed** a summary judgment in an automobile dealer termination case where the Court found the

motive of the plaintiff's competitors to conspire to secure its termination by the manufacturer to be **economically plausible**:

> This case is unlike *Matsushita* for two reasons, each of which **alone** would **require** us to **reverse** the district court's grant of summary judgment. . .
>
> The second reason why Matsushita is of little or no applicability in this case stems from the differing inferences that can be drawn from the available evidence. . . . Here the action is based on concerted action by Arnold Pontiac's putative competitors, the Buick dealers, to deprive it of a Buick franchise in which it would directly compete with them. We need not resort to the type of learned treatises referred to in *Matsushita* to recognize that here, **unlike in that case**, there was a **"plausible motive"** for the alleged concerted action, i.e., to have one less competitor in a limited market. Matsushita directs us in evaluating summary judgment in section 1 Sherman Act cases to consider whether "the inference of conspiracy is reasonable." 106 S. Ct. at 1357. Here, unlike in *Matsushita*, the alleged combination among the Buick dealers would be rational. One dealer complaining to GMC might have a negligible effect. The effect on GMC of the combined strength of its principal dealers in that area would hardly be negligible.
>
> Because . . . there is a plausible motive for such a combination and its existence is not unreasonable, we will vacate the district court's grant of summary judgment for defendants and remand the Sherman Act section 1 claims to the district court. Id. at 1338. (Emphasis added).

Likewise in Instructional Sys. Dev. Corp. v. Aetna Cas. & Sur. Co., 817 F.2d 639 (10th Cir. 1987), the Tenth Circuit afforded proper weight to the existence of a **plausible motive** to conspire in **reversing** summary judgment.

> The recent ruling in *Matsushita* [citation omitted] does not alter our conclusion. In *Matsushita*, the plaintiffs asserted an illegal agreement under which the defendants allegedly entered into a predatory pricing conspiracy in this country and a conspiracy to maintain artificially high prices in Japan. . . The Supreme Court's reversal was based on its conclusions: 1) that the predatory pricing conspiracy was **so economically implausible** that the defendants had **no motive** to engage in it; and 2) that

> the evidence of an agreement to enter into this conspiracy was indirect and ambiguous. The Court held that **under these circumstances**, the plaintiffs had failed to create a fact issue on the existence of a section 1 conspiracy. The Court reiterated its holding in Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984), that "to survive a motion for summary judgment ..., a plaintiff seeking damages for a violation of § 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Matsushita*, 106 S. Ct. at 1357 (quoting *Monsanto*, 465 U.S. at 764).
>
> The instant case is **readily distinguishable** from *Matsushita*. The anticompetitive acts asserted in this case as violative of section 1 are not obviously economically costly to the conspirators as was the predatory pricing scheme alleged in Matsushita. **The alleged goal of the section 1 conspiracy here was in fact achieved, contrary to the situation in *Matsushita*.** See 106 S. Ct. at 1359. Moreover, as discussed above, Aetna could reasonably have been economically motivated to help Doron achieve a hardware monopoly . . . Under the guidelines of *Matsushita* and *Monsanto*, the evidence here tends to exclude the possibility that Doron and Aetna acted independently in pursuing the conduct challenged under section 1. Id. at 646. (Emphasis added).

In the face of evidence of a **plausible economic motive** to conspire here, the evidence of the banks' conspiracy is not ambiguous, and the inferences arising from the evidence of uniform prices **suffice to defeat summary judgment**.

CONCLUSION

Eastman Kodak, which was released in 1992, clarified that the holding in Matsushita was limited to the factual situation **alone** where there was no apparent **economic motive** to conspire. When that is the case, Matsushita increases the burden on plaintiffs to overcome a motion for summary judgment by tendering inferential evidence that is more plausible than the defendants' theory justifying their market behavior. Even in that situation, however, the defendants must reasonably **substantiate the veracity** of their alleged theory. In its analysis, the Sixth Circuit "hung its hat" on the **logical consideration** of the defendants contentions for why they maintain such high prices. While it may have been quite **natural** to assume the veracity of such explanation from a **logical** standpoint,

it was clearly **incorrect from a legal standpoint** because at a minimum, plaintiffs sufficiently put in evidence on the Record which created a **material dispute of fact** as to the veracity of such deterrence contention.

In the present case, like Eastman Kodak, the plaintiffs' theory of defendants price fixing offers a strong economic motive for the defendants to indeed engage in such conduct, the opportunity to reap enormous profits. Thus, under this Court's clear language set forth in Eastman Kodak, since the plaintiff's theory makes economic sense, a reasonable jury could find in plaintiffs' favor, and summary judgment should not be granted.

For all of the foregoing reasons, Petitioners respectfully submit that this Court should grant their Petition, that a writ of certiorari should issue, and that the decision of the Sixth Circuit Court of Appeals should ultimately be reversed.

Respectfully Submitted,

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APPENDIX

APPENDIX

DECISION OF THE SIXTH CIRCUIT ON PETITION TO REHEAR:

MARGARET M. BAKER, ET AL., Plaintiffs-Appellants, v. BANK OF BARTLETT, ET AL., Defendants-Appellees.

BAKER v. BANK OF BARTLETT

No. 94-5499

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

1995 U.S. App. LEXIS 19704

July 7, 1995, FILED

PRIOR HISTORY: Original Opinion of June 2, 1995, Reported at: 1995 U.S. App. LEXIS 13501.

JUDGES: BEFORE: KENNEDY and SUHRHEINRICH, Circuit Judges; and HILLMAN, * District Judge

* Hon. Douglas W. Hillman, Senior United States District Judge for the Western District of Michigan, sitting by designation

OPINION: ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ORIGINAL DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT:

APRIL WALLACE and VICKIE GWIN, et al. Plaintiffs-Appellants, v. BANK OF BARTLETT, BOATMEN'S BANK OF TENNESSEE, FIRST AMERICAN NATIONAL BANK, FIRST TENNESSEE BANK, N.A., LEADER FEDERAL BANK FOR SAVINGS, NATIONAL BANK OF COMMERCE, NATIONSBANK, TRI-STATE BANK OF MEMPHIS and UNION PLANTERS NATIONAL BANK, Defendants-Appellees.

GWIN v. BANK OF BARTLETT

No. 94-5499

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

55 F.3d 1166; 1995 U.S. App. LEXIS 13501; 1995 FED App. 165;
1995-1 Trade Cas. (CCH) P71,016
1995 FED App. 0165P (6th Cir.)

May 1, 1995, Argued
June 2, 1995, Decided
June 2, 1995, Filed

SUBSEQUENT HISTORY: As Corrected June 6, 1995.

Rehearing and Rehearing En Banc Denied July 7, 1995, Reported at: 1995 U.S. App. LEXIS 19704.

PRIOR HISTORY: ON APPEAL from the United States District Court for the Western District of Tennessee. District No. 92-02431. Julia S. Gibbons, District Judge.

DISPOSITION: AFFIRMED

COUNSEL: For MARGARET M. BAKER, APRIL WALLACE, VICKIE GWIN, et al., Plaintiffs - Appellants: William H. Baughman, Jr., ARGUED, Weston, Hurd, Fallon, Paisley & Howley, Cleveland, OH. Ira M. Thomas, BRIEFED, Memphis, TN. For ALVIN BARNES, Plaintiff - Appellant: Robert L. Green,

BRIEFED, Neely, Green, Fargarson & Brooke, Memphis, TN. Ira M. Thomas, Memphis, TN.

For BANK OF BARTLETT, Defendant - Appellee: Bill R. Hester, BRIEFED, Bartlett, TN. For FIRST AMERICAN, Defendant - Appellee: J. O. Bass, Jr., Bass, Berry & Sims, Nashville, TN. For FIRST TENNESSEE BANK, Defendant - Appellee: John C. Speer, Baker, Donelson, Bearman & Caldwell, Memphis, TN. For LEADER FEDERAL BANK, Leader Federal Bank for Savings, Defendant - Appellee: Robert E. Craddock, BRIEFED, Memphis, TN. For NATIONAL COMMERCE BANCORPORATION, Defendant - Appellee: Frank J. Glankler, Jr., BRIEFED, C. Barry Ward, Robert L. Hutton, Glankler, Brown, Gilliland, Chase, Robinson & Raines, Memphis, TN. For NATIONSBANK OF TENNESSEE, Defendant - Appellee: H. Frederick Humbracht, Jr., BRIEFED, Boult, Cummings, Conners & Berry, Nashville, TN. For TRI-STATE BANK, Defendant - Appellee: Elijah Noel, Jr., BRIEFED, Noel & Sugarmon, Memphis, TN. For UNION PLANTERS NATIONAL BANK, Defendant - Appellee: J. Richard Buchignani, BRIEFED, Robert L. Crawford, McDonnell Boyd, Memphis, TN. Thomas J. Walsh, Jr., Wolff Ardis, Memphis, TN. For BOATMEN'S BANK OF TENNESSEE, Defendant - Appellee: C. Lee Cagle, David Wade, ARGUED, BRIEFED, Martin, Tate, Morrow & Marston, Memphis, TN.

JUDGES: Before: KENNEDY and SUHRHEINRICH, Circuit Judges; HILLMAN, District Judge. *

* The Honorable Douglas W. Hillman, United States District Judge for the Western District of Michigan, sitting by designation.

OPINION BY: KENNEDY

OPINION:

KENNEDY, Circuit Judge. Plaintiffs brought this action against nine banks doing business in Tennessee (the "Banks").[1] alleging that the Banks conspired, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, to fix the amount of certain fees charged to bank customers. The fees at issue are the fees the Banks charge customers for writing checks upon accounts with insufficient funds ("NSF") and for depositing checks which are returned

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[1] The Banks are Bank of Bartlett, Boatmen's Bank of Tennessee, First American National Bank, First Tennessee Bank, N.A., Leader Federal Bank for Savings, National Bank of Commerce, NationsBank, Tri-State Bank of Memphis and Union Planters National Bank.

uncollected ("DIR").[2] Plaintiffs are individuals who allegedly paid NSF fees at each of the respective defendant banks.

Plaintiffs admit that they do not have any direct evidence of any agreement or conspiracy among the Banks to set prices but contend that the uniformity of these fees shows there is tacit collusion. The District Court granted summary judgment in favor of defendants. Plaintiffs appeal, arguing that the District Court erred in determining that they failed to present sufficient evidence to exclude the possibility that the Banks were pursuing legitimate independent business interests. For the following reasons, we affirm.

I.

We review a district court's grant of summary judgment de novo, Hanover Ins. Co. v. American Eng'g Co., 33 F.3d 727, 730 (6th Cir. 1994), "viewing all facts and inferences drawn therefrom in the light most favorable to the nonmoving party." Boyd v. Ford Motor Co., 948 F.2d 283, 285 (6th Cir. 1991), cert. denied, 503 U.S. 939 (1992). Rule 56(c) of the Federal Rules of Civil Procedure mandates the entry of summary judgment where there is "no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Summary judgment is appropriate if plaintiffs failed to make a showing sufficient to establish any element essential to their claims and on which they bear the burden of proof. Barnhart v. Pickrel, Schaeffer & Ebeling Co., 12 F.3d 1382, 1388-89 (6th Cir. 1993).

Summary judgment may be granted even in a complex antitrust case because "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." Matsushita Electric. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). In Riverview Investments, Inc. v. Ottawa Community Improvement Corp., 899 F.2d 474 (6th Cir.), cert. denied, 498 U.S. 855 (1990), we established a two-part inquiry for evaluating a summary judgment motion in an antitrust conspiracy case:

> (1) Is the plaintiff's evidence of conspiracy ambiguous, i.e., is it as consistent with the defendants' permissible independent interests as with an illegal conspiracy; and, if so, (2) is there any evidence that tends to exclude the possibility that the defendants were pursuing these independent interests.

Id. at 483 (citation omitted). We held that a plaintiff cannot demonstrate a conspiracy "if, using ambiguous evidence, the inference of a conspiracy is less than or equal to an inference of independent action." Id.

II.

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[2] For purposes of brevity, we will refer to both of these types of fees as "NSF" throughout the opinion.

It is not necessary for an antitrust plaintiff to introduce any direct evidence of a conspiracy. Rather, a conspiracy can be inferred from business behavior which evidences "a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement." Nurse Midwifery Ass'n. v. Hibbett, 918 F.2d 605, 616 (6th Cir. 1990) (citation omitted), cert. denied, 502 U.S. 952 (1991).

However, parallel pricing, without more, does not itself establish a violation of the Sherman Act. Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 541, 98 L. Ed. 273, 74 S. Ct. 257 (1954); General Business Sys. v. North Am. Philips Corp., 699 F.2d 965, 976 (9th Cir. 1983). Courts require additional evidence which they have described as "plus factors." Examples of these "plus factors" include actions contrary to a defendant's economic self-interest, Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1456 (11th Cir. 1991), product uniformity, exchange of price information and opportunity to meet, Wilcox v. First Interstate Bank, N.A., 815 F.2d 522, 525-26 (9th Cir. 1987), and a common motive to conspire or a large number of communications, Apex Oil Co. v. Di Mauro, 822 F.2d 246, 253-54 (2d Cir.), cert. denied, 484 U.S. 977 (1987).

Plaintiffs first contend that because the Banks all charge essentially the same fee for NSF checks, they have conspired to fix the level of fees. In addition, plaintiffs argue that the public disclosure of the fees and the alleged failure of the Banks to set NSF fees relative to cost are the plus factors which, in addition to the alleged parallel pricing, show a violation of section 1. Plaintiffs also rely on the affidavits of two experts stating that defendants would not be able to charge high NSF fees without collusion.

The Banks assert that the prices are not sufficiently similar to constitute parallel pricing. The District Court examined the record, however, and concluded that, when the inferences from the evidence were construed in favor of plaintiffs, "the variances between the fees are not as drastic as the Banks contend."[3] The Banks do not raise this issue of the similarity of the prices on appeal. Rather, they argue that even assuming their prices are similar, plaintiffs have failed to present other evidence sufficient to support an inference of a conspiracy.

Plaintiffs mainly rely on the fact that the Banks do not set NSF fees relative to the cost of processing NSF checks as evidence of a conspiracy beyond parallel pricing. In support of their

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[3] The Banks argued to the District Court that on a statewide level, NSF fees varied by as much as 44%, varied by as much as 26.67% on a citywide level, and varied within individual banks' branches by as much as 90%. The NSF fees varied from $ 10.00 to $ 20.00 per transaction.

argument, plaintiffs cite 12 C.F.R. § 7.8000 (1995) which provides that:

> (a) All charges to customers should be arrived at by each bank on a competitive basis and not on the basis of any agreement, arrangement, undertaking, understanding or discussion with other banks or their officers.
>
> (b) Establishment of deposit account service charges, and the amounts thereof, is a business decision to be made by each bank according to sound banking judgment and federal standards of safety and soundness. In establishing deposit account service charges, the bank may consider, but is not limited to considering:
>
> (1) Costs incurred by the bank, plus a profit margin, in providing the service;
>
> (2) The deterrence of misuse by customers of banking services;
>
> (3) The enhancement of the competitive position of the bank in accord with the bank's marketing strategy;
>
> (4) Maintenance of the safety and soundness of the institution. . . .

Plaintiffs contend that under this regulation, the Banks must take into account the costs of processing NSF and DIR checks and that their failure to do so is evidence of a conspiracy.

Defendants concede that they do not price NSF charges in relation to cost. They note that although section 7.8000 states that the Banks may consider costs, it does not require costs to be taken into account. We agree with the District Court that "the failure of the banks to consider one factor does not require the conclusion that the banks conspired to set the level of NSF fees."

It is clear from the affidavits submitted by the Banks that they do in fact take many legitimate factors into account besides costs. Several of the Banks submitted affidavits stating that they established high prices for NSF checks because they did not want to attract customers who write these checks and wanted to deter customers from this behavior.[4] One bank stated that it set NSF fees based on

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[4] For instance, one bank's affidavit stated that "when NSF, DRI and other overdrafts are honored, unsecured and often unsound extensions of credit result which may go uncollected. In addition, check kiting and other fraudulent schemes that result in losses to banking institutions can arise out of presentation of overdraft items. Setting NSF charges at their current levels . . . is designed to discourage this undesirable conduct." Another affidavit stated that "excessive overdrafts are detrimental to the banking system because at some level they will cause a loss of confidence in checks as a medium of payment . . . . First American does not want customers who continually bounce checks. First American's procedures require that the account of a customer who bounces an excessive

"what the market is charging, government regulations, and business judgment." Another bank considers profitability, handling and processing costs, competitive position, and the maintenance of safety and soundness.

Plaintiffs also argue that the manner in which NSF fees are publicized allows the banks to collude in setting prices. However, the Banks' publication of prices is as least as consistent with their independent interests as it is with collusion.

First, the Banks certainly have a legitimate interest in providing customers relevant information regarding the fees associated with their checking accounts. The Banks also have an interest in publishing prices to attract or deter consumers from opening accounts. "Permitting an inference of conspiracy [based on the dissemination or advertising of retail prices] would make it more difficult for retail consumers to get the information they need to make efficient market decisions." In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 906 F.2d 432, 448 n.14 (9th Cir. 1990), cert. denied, 500 U.S. 959 (1991).

Most of the Banks admit they evaluate the fees charged by other banks when they set fees. "The exchange of price information among competitors is not a per se violation of the antitrust laws." Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1505 (11th Cir. 1985), cert. denied, 475 U.S. 1107 (1986); United States v. United States Gypsum Co., 438 U.S. 422, 441 n.16, 57 L. Ed. 2d 854, 98 S. Ct. 2864 (1978). The Banks naturally are interested in surveying the market to determine what other banks are charging in order to make strategic competitive decisions. All of the affidavits submitted by the Banks contained statements to the effect that there was no agreement or collusion between them, tacit or otherwise. Although publication and evaluation of prices can serve as a means to violate section 1,[3] plaintiffs have produced no evidence that this is occurring.

Plaintiffs offer two affidavits in support of their allegations that the Banks have tacitly conspired to fix prices. First, they have

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amount of checks in a twelve month period be closed." Another bank's affidavit contained the statement "to contend that [NSF charges are] an area of business that is encouraged by NationsBank is pure folly. The ideal customer is one who keeps large balances in the account, makes deposits, writes few checks and is never overdrawn."

[3] For instance, public dissemination of prices can violate the Sherman Act where the publication serves little purpose other than facilitating "collusion, Petroleum Products, 906 F.2d at 448, or where prices are published in advance by a price leader to communicate its intention and to gauge reactions of competitors. Id. at 446. The fees are published here together with other charges to advise customers of the charges they must pay.

submitted the affidavit of Allen Buckalew, an economist with a Master of Science degree. Buckalew reviewed the Banks' depositions, 12 C.F.R. 7.8000, the Banks' pricing history and a presumed cost per NSF check of $ .15 to $ 1.50 and stated that:

> Assuming all of the above, and further assuming that defendants have historically totally failed to openly compete in the market for customers on the basis of more attractive NSF charges, I can testify that based on well-accepted economic theories dealing with supply and demand in our American economy, defendants have been able to maintain these artificially excessive NSF/DIR charges by means of a tacit agreement not to compete on such charges and to set the prices at the inflated amounts which they presently are.

The Banks contend that this affidavit fails to raise a genuine issue of material fact because the expert offers no additional facts or evidence and relies on conclusory allegations.

Buckalew's affidavit is not sufficient to defeat the Banks' motion for summary judgment. In Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993), the Supreme Court held that an economist's expert testimony which was based on insufficient facts could not be relied on to support a jury verdict. Id. at 2598. The Court stated that "expert testimony is useful as a guide to interpreting market facts, but is not a substitute for them." Id. Buckalew's conclusions are based on nothing more than facts which, as we have already stated, are equally consistent with independent actions by the Banks. For instance, the Banks readily admit that they have "totally failed to openly compete" because they do not want to attract customers who write checks with insufficient funds to cover them.

Plaintiffs submitted another affidavit from Antonio L. Zate, a certified public accountant with a masters degree in economics who has worked as a bank examiner for the Federal Reserve Bank.[6] According to Zate, the banking industry's income derived from interest has been declining since the early 1980s while income derived from "non-interest income sources" such as NSF fees has been increasing. It is Zate's "educated and professionally-gained opinion" that the "enormous profit" from NSF fees would not have been possible without collusion between banks. Zate's opinion, however, does not exclude the possibility that the Banks wanted to keep these fees high to discourage NSF check-writing or that, by

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[6] The Banks argue that the District Court should not have considered Zate's affidavit. They contend that the affidavit was submitted after the discovery deadline established by the District Court's scheduling order and that plaintiffs stated that no experts had been retained in their responses to expert interrogatories. The District Court found it unnecessary to reach these issues in light of its order granting summary judgment. Likewise, we need not address these arguments.

increasing NSF fees to compensate for lost interest revenue, the Banks were maintaining the safety and soundness of the institution as permitted by 12 C.F.R. 7.8000. Plaintiffs' expert evidence is equally consistent with independent action as it is with conspiracy.

Finally, plaintiffs assert that they have not been able to produce evidence to respond to defendants' summary judgment motion because defendants denied them access to any discovery. However, at a status conference held on February 2, 1994, plaintiff's counsel agreed with the court that "there [was] a consensus that the summary judgment motion can be resolved, and [it was] not dependent on [plaintiffs] obtaining anything else." Furthermore, the information plaintiffs sought apparently had to do with the actual costs to the Banks of processing NSF checks, and defendants stated that they were not challenging plaintiffs' assumptions concerning costs for the purposes of the summary judgment motion. Thus, the District Court properly granted summary judgment in favor of defendants.

III.

For the foregoing reasons, we AFFIRM the District Court's grant of summary judgment.

/s June 2, 1995

MARCH 11, 1994 DECISION OF THE DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE:

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESEE
WESTERN DIVISION

APRIL WALLACE, et. al.,

Plaintiffs,

vs. No. 92-2431-G

BANK OF BARTLETT, et. al.,

Defendants.

ORDER GRANTING SUMMARY JUDGMENT

Before the court is the joint motion of defendants, Bank of Bartlett, Boatmen's Bank, First American National Bank, First Tennessee Bank, Leader Federal Bank, National Bank of Commerce, Nationsbank, Tri-state Bank and Union Planters National Bank, for summary judgment pursuant to Federal Rule of Civil Procedure 56. Plaintiffs brought this action alleging that the defendant banks conspired to fix the fees assessed for writing checks upon accounts with insufficient funds (NSF) at an artificially high level. Plaintiffs also attack the setting of fees assessed for depositing checks that are returned for insufficient funds (DIR). Plaintiffs argue that this behavior violates § 1 of the Sherman Antitrust Act, prohibiting agreements or conspiracies to fix prices. 15 U.S.C. § 1.

Plaintiffs are individuals who allegedly paid NSF fees at each of the respective defendant banks.[1] Although plaintiffs admit that

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[1] At least two banks contend that the respective plaintiffs claiming to have suffered such charges at the banks were not, in fact, assessed NSF charges during the relevant time period. Plaintiffs seek to correct this by adding additional parties. The motions to add additional plaintiffs and for class certification are pending before the court. In view of this order, the court finds it unnecessary to reach these issues.

they do not have any direct evidence of an agreement between the banks to set prices, they argue that because the fees are substantially the same amount (parallel pricing), there must be a tacit agreement between the banks to keep their fee levels artificially high. Plaintiffs base this argument on the contention that the fees are not set according to the cost of processing NSF checks and on economic theory.

Defendants contend that plaintiffs have not produced any evidence of an antitrust violation. In addition, defendants deny that any agreement was formed between any of the banks to set NSF fees. The banks admit that the fees do not reflect the cost of processing NSF checks, but they offer independent bases for setting NSF fees.

Federal Rule of Civil Procedure 56 provides that a motion for summary judgment shall be granted if, based on the record as a whole, "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In a motion for summary judgment, the moving party "bears the burden of clearly and convincingly establishing the nonexistence of any genuine issue of material fact, and the evidence as well as all inferences drawn therefrom must be read in a light most favorable to the party opposing the motion." Kochins v. Linden-Alimak, Inc., 799 F.2d 1128, 1133 (6th Cir. 1986).

Pursuant to Rule 56(e), when confronted with a properly supported motion for summary judgment, the non-moving party "must set forth specific facts showing that there is a genuine issue for trial." A genuine issue of material fact exists "if the evidence (presented by the non-moving party] is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 258 (1986). In essence, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 259.

In the past, courts have been hesitant to grant motions for summary judgment in complex antitrust cases. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962). More recently, however, courts have found that under certain circumstances, summary judgment may be appropriate in complex antitrust cases. Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986) ("antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case.").

In Riverview Invest., Inc. v. Ottawa Community Improv. Corp., 899 F.2d 474, 483 (6th Cir. 1990), the Sixth Circuit cautioned against inferring a conspiracy in violation of the Sherman Act if, "there is no economic motive to conspire and there is a nonconspiratorial explanation for the alleged conspiratorial conduct." The court established a two part inquiry to evaluate summary judgment motions in antitrust actions: "(l) is the plaintiff's evidence

of conspiracy ambiguous, i.e., is it as consistent with the defendants' permissible independent interests as with an illegal conspiracy; and, if so, (2) is there any evidence that tends to exclude the possibility that the defendants were pursuing these independent interests."

Plaintiffs may prove an agreement or conspiracy to fix prices in violation of § 1 of the Sherman Antitrust Act through circumstantial evidence. Nurse Midwifery Assoc. v. Hibbett, 918 F.2d 605, 616 (6th Cir. 1990) ("A plaintiff in an antitrust suit need not introduce any direct evidence of an alleged conspiracy"). Plaintiffs offer the contention that because the banks all charge essentially the same amount in NSF fees, they have conspired to fix the level of NSF fees. Plaintiff specifically relies on this circumstantial evidence of parallel pricing to establish that defendants were engaging in an unlawful conspiracy to fix prices.

Parallel pricing, however, is considered ambiguous evidence that may be consistent with permissible independent interests. Courts have held that parallel pricing, without more, is insufficient to raise a material issue of fact whether an agreement or conspiracy to fix prices existed. Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 541 (1954) ("this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense."); General Business Systems v. North American Philips Corp., 699 F.2d 965 (9th Cir. 1983) (Price parallelism alone generally will not establish price fixing. Other circumstantial evidence is required.) Accordingly, "[p]arallel behavior and the hope that something further be developed at trial is not sufficient to warrant a trial on the merits." Weit v. Continental Illinois Nat. Bank & Trust Co., 641 F.2d 457, 462 (7th Cir. 1981).

Additional evidence required by courts in antitrust cases is described as "plus factors." "Plus factors" may, in combination with parallel pricing, create a reasonable inference of a conspiracy in violation of the Sherman Act. Courts have described different types of evidence which amount to "plus factors." Todorov v. DCH Healthcare Authority, 921 F.2d 1438, 1456 (11th Cir. 1991) (described a plus factor as "each defendant engaging in the parallel action acted contrary to its economic self-interest"); Wilcox v. First Interstate Bank, N.A., 815 F.2d 522, 525 (9th Cir. 1987) (Plus factors may include "price parallelism, product uniformity, exchange of price information, and opportunity to meet to form anti-competitive policies."); Apex Oil Co. v. Di Mauro, 822 F.2d 246, 254 (2nd Cir. 1987) (examples of plus factors: "common motive to conspire or a high level of interfirm. communications."); McElhinney v. Medical Protective Co., 549 F. Supp. 121, 129 (E.D.Ky. 1982), remanded 738 F.2d 439 (6th Cir. 1984) (five plus factors: "1) indications of traditional conspiracy; 2) motive; 3)

actions contrary to economic self-interests; 4) poor economic performance; 5) actions facilitating oligopolistic collaboration.").

In order to establish a violation of the antitrust law, courts require plaintiffs relying on parallel pricing as evidence of a conspiracy to offer additional evidence of a conspiracy. Defendants contend that there is no evidence of parallel pricing and no additional evidence of a conspiracy between the banks to fix prices. Plaintiffs argue that the banks' fees are parallel and that the publication of prices, profit motives, economic theory and the lack of relationship between the fees and cost establish an inference of conspiracy.

The banks argue that the prices are not sufficiently similar to constitute parallel pricing. The banks offer evidence that the prices diverge on statewide, intra-city and intra-holding levels.[2] They rely on several cases to support the proposition that insufficient evidence of parallelism requires dismissal of plaintiffs' claims. See Independent Iron Works, Inc. v. U.S. Steel Corp., 322 F.2d 656 (9th Cir. 1963) (finding that the plaintiffs' evidence lacked uniformity and conspiratorial circumstances to demonstrate an antitrust violation). The banks conclude that plaintiffs may not prove a conspiracy given the difference in fees among the banks.

Plaintiffs argue that, "[d]espite the negligible but indeed varying costs, the defendants have conveniently all come up with basically the same price to charge for their NSF/DIR services." Plaintiffs do not attempt to substantiate this position by reference to the record.

Upon review of the record, the court finds that the variances between the fees are not as drastic as the banks contend. Although differences exist between the fees, the court finds that the majority of the bank branches charge substantially similar fees. Accordingly, the inference from the evidence must be construed in favor of the plaintiff upon a summary judgment motion. Thus, the court finds that the pricing information is sufficiently similar to establish a genuine issue of fact as to whether the prices are parallel and demonstrate a conspiracy to fix prices.

Plaintiffs' "plus factors" include the failure of the banks to set the NSF fees relative to cost, the public nature of the fees and two experts' affidavits. Plaintiffs rely primarily on the fact that NSF fees are not set relative to the cost of processing a NSF check. Plaintiffs cite 12 C.F.R. S7.800, which provides that national banks may set their fees by considering

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[2] The banks argue that the fees vary between the defendant banks. Specifically, the banks cite differences where in comparing bank's fees on a statewide level, fees varied by as much as 44%, on a citywide level as much as 26.67%, and within individual banks' branches as much as 90%.

(1) Costs incurred by the bank, plus a profit margin, in providing the service; (2) The deterrence of misuse by customers of banking services; (3) The enhancement of the competitive position of the bank in accord with the bank's marketing strategy; (4) Maintenance of the safety and soundness of the institution.

Plaintiffs argue that "[a]t the same time that they [defendants] say that they do not set their NSF/DIR charges in relation to cost, they claim that they do use this CFR as a guideline for setting their prices, and this CFR states unequivocally that the bank is to use their cost factor as the very first criteria."

Contrary to plaintiffs' position, the regulation provides that the banks are not limited to consideration of the listed factors and it does not require the banks to consider any of these factors. 12 C.F.R. S7.8000. The majority of defendant banks state that cost is not a factor in setting their NSF fees. The defendants attest that they have never entered into any explicit or tacit agreements with other banks to conspire to fix NSF fees. The banks offered affidavits or responses to interrogatories describing the manner in which they set NSF fees.[3] 3 The banks' failure to consider one of the four factors they may consider, but are not required to consider, does not exclude the possibility that the banks acted independently. Each bank could easily rely on the three remaining factors and issues not mentioned by the federal regulation when setting NSF fees. In fact, the banks offer factors that they considered in setting their fees and they included both the CFR factors and other issues. The failure to consider cost would not allow a trier of fact to reasonably conclude that this evidence excludes independent legitimate factors and creates an inference that the banks conspired to set NSF fees.

Plaintiffs claim that the manner in which the NSF fees are publicized and released into the community allows the banks to collude in setting prices. Mere publication of prices, however, fails to exclude the possibility that the banks independently reached similar fees. Amey Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1505 (11th Cir. 1985) ("The exchange of price information among competitors is not a per se violation of the antitrust laws.").

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[3] For example, Boatmen's states that it sets NSF fees by considering "overall review of the bank's business, deterrence of misuse by customers, market conditions and competition, the handling charge which businesses are allowed to charge customers whose checks are returned for insufficient funds pursuant to Tenn. Code Ann. §47-29-102, and the loss of money by Boatmen's when customers draw insufficient funds checks and fail to make those checks "good" by depositing funds into their accounts." First American claims that the NSF fee is viewed in two ways "(l) it is an important component of profitability (given the current competitive environment and checking account pricing options) ; and (2) it is designed to be a deterrent charge."

Most of the banks do not deny evaluating the fees charged by other banks when they are setting their own fees. The banks are competing with each other for checking account customers and naturally survey the market for the rates other banks are charging. See Wilcox v. First Interstate Bank, N.A., 815 F.2d 522, 528 (9th Cir. 1987) ("Prime rates will arguably be nearly identical when each bank pursues its individual selfinterest because failure to follow national prime rates could cause either losses or severe liquidity problems.).

Although the court in Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 906 F.2d 432, 448 n.14 (1990), found that an inference of conspiracy was permissible from the public dissemination of information, the court advised that

> Our conclusion would necessarily be different were the appellants' inference of a price-fixing conspiracy based on the dissemination or advertising of retail prices; permitting an inference of conspiracy from such evidence would make it more difficult for retail consumers to get the information they need to make efficient market decisions.

The banks assert that the publication of prices is consistent with giving consumers all relevant information regarding the services and fees their checking accounts provide. The distribution of this information is essential to competition for customers. The publication of the rates does not tend to exclude the possibility that the banks acted independently to set their rates. To hold that the public availability of prices established an antitrust violation would potentially expose every vendor of retail goods or services to litigation.

Plaintiffs also offer the affidavit of expert witness Allen Buckalew in support of the allegations that the defendant banks have conspired unlawfully to fix prices. Buckalew is an economist with a Master of Science degree. He has participated as an expert witness and consultant in court proceedings regarding antitrust issues. Buckalew states that,

> Assuming all of the above, and further assuming that defendants have historically totally failed to openly compete in the market for customers on the basis of more attractive NSF charges, I can testify that based on well-accepted economic theories dealing with supply and demand in our American economy, defendants have been able to maintain these artificially excessive NSF/DIR charges by means of a tacit agreement not to compete on such charges and to set the prices at the inflated amounts which they presently are.

Affidavit of Allen G. Buckalew.

The banks contend that the testimony of this expert fails to raise a genuine issue of material fact. The banks argue that the expert offers no additional facts or evidence and relies solely on conclusory allegations. Specifically, the banks rely on recent court

decisions finding that expert opinion testimony not supported by sufficient facts may not support a verdict. See Brooke Group Ltd. v. Brown & Williamson Tobacco Corporation, 113 S.Ct. 2578, 2598 (1993) ("[w]hen an expert opinion is not supported by sufficient facts to validate plaintiff in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury verdict."); Monks v. General Electric Co., 919 F.2d 1189, 1193 (6th Cir. 1990) ("[t]he Ellis affidavit is the only piece of evidence produced by plaintiffs . . . [s]uch minimal evidence should not be permitted to defeat a motion for summary judgment when there has been sufficient opportunity for discovery.").[4]

In Brooke Group, the United States Supreme Court found that the expert testimony of an economist based on insufficient facts could not be relied on to support a verdict. Brooke Group at 2598. In particular, the court held that "[e]xpert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them." Id. Buckalew relies on economic theories, not described in the affidavit, and on the allegation that the banks maintain similar prices. Further, Buckalew based his conclusions on the irrelevance of cost to setting of the NSF fees. The banks, however, admit that cost is not a factor in setting NSF fees and provide legitimate factors considered in setting NSF fees. Buckalew proceeds to draw conclusions from facts which are insufficient to exclude the possibility that the banks acted independently. His endorsement that the facts are sufficient to create an inference of conspiracy, combined with several assumptions, is not sufficient to defeat a summary judgment motion.

Even if the affidavit is reliable evidence under Brooke Group, several banks effectively explain the circumstances by stating that they do not, understandably, want to compete for the individuals who are assessed the most NSF charges. NSF checks erode the credibility of the document and put the bank at risk for losses.[5] The

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[4] Plaintiffs object to the defendants' reliance on these cases. Plaintiffs successfully distinguish these cases from the current facts, but the cases still support the proposition that expert testimony unsupported by evidence will not be considered reliable evidence to create an issue of fact.

[5] Defendants' affidavits indicate, in part, that "[w]hen NSF, DRI and other overdrafts are honored, unsecured and often unsound extensions of credit result which may go uncollected. In addition, check kiting and other fraudulent schemes that result in losses to banking institutions can arise out of presentation of overdraft items." Union Planters, Affidavit of Bruce Howland; and "[e]xcessive overdrafts are detrimental to the banking system because at some level they will cause a loss of confidence in checks as a medium of payment and a reluctance to

banks admittedly do not compete for customers interested in writing a large number of checks while having insufficient funds in their accounts. At least one bank proposes to close accounts of customers who write too many NSF checks.[6] The customers interested in the lowest NSF fees are not individuals that the banks want to serve.[7] Although Buckalew argues that there must exist a tacit agreement not to compete on NSF charges, another equally plausible explanation is that the fees remain the same because these customers are not desirable from an economic standpoint. The defendant banks, thus, act in their economic self-interest in setting similarly high fees for uniformly undesirable conduct.

Plaintiffs have alleged a conspiracy based on the alleged fact that the conspiracy allows all the banks to charge high fees for NSF checks. However, an equally plausible contention offered by the banks is that the banks did not want to compete for individuals who put the bank at risk for nonpayment. With the conclusory allegations offered by plaintiff and Buckalew's affidavit, the motives to conspire remained equally consistent with the banks' alleged choice to deter NSF checks with high fees. Plaintiffs have recently, however, come forth with additional evidence that also provides another reason for the banks to engage in the alleged conspiracy.

Plaintiffs' new expert, Antonio L. Zate, states that, in accordance with economic trends, the banks are faced with a compelling economic motive to set high NSF fees in order to replace lost income from decreasing loan profits.[8] Banks are faced with

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accept checks in lieu of cash and credit cards." First American, Affidavit of Dennis J. Hooks.

[6] "First American's procedures require that the account of a customer who bounces an excessive amount of checks in a 12 month period be closed." First American, Affidavit of Dennis J. Hooks.

[7] For example, "Nationsbank . . . (has] never competed for checking account customers based on who would write the most NSF items. To contend that this is an area of business that is encouraged by Nationsbank is pure folly. The ideal customer is one who keeps large balances in the account, makes deposits, writes a few checks and is never overdrawn." Nationsbank, Affidavit of Lamar Cox.

[8] Mr. Zate is a certified public accountant with a masters degree in economics and finance. He is currently managing principal of a consulting firm and previously worked for the Federal Reserve Bank of San Francisco. Although defendants contend that the court should not consider Mr. Zate's affidavit due to plaintiffs' violation of the discovery deadline, Scheduling Order and Federal Rule of Civil Procedure 26(b) (4), the court finds it unnecessary to reach this argument

decreasing income from traditional lending due to a variety of economic factors. A national trend has thus formed where banks are relying more and more on income from service fees for banking privileges to replace the income formerly earned by interest levels on loans. Plaintiffs argue that this trend and the corresponding pressure on banks to rely on service fees creates an inference that the banks' reliance on these fees and recent increases in these fees is the result of an agreement between the banks to keep the fees high to maintain profit levels.

Plaintiffs fail to point out, however, how this evidence tends to exclude the possibility that the banks acted independently and set the fees in order to deter misuse of bank services.[9] The evidence of this economic motive to conspire is as consistent with the view that fees are set high and in the same range because banks seek to deter this conduct.[10]

The court must decide whether the factors alleged by plaintiffs rise to the level of excluding the possibility that the banks acted independently. In Weit v. Continental Ill. Nat. Bank & Trust Co., 641 F.2d 457, 461 (7th Cir. 1981), the court upheld the district court's finding that "parallel interest rate; the opportunity to conspire to fix those rates; the specific references to interest rates in the record; and the opinion of Professor Shull did not create a reasonable inference of the conspiracy." Similarly, the court finds that the fact that cost is not relative to the NSF fees, the publication of NSF fees and the opinions of Allen Buckalew and Antonio Zate fail to allow a trier of fact to reasonably find that the evidence tends to exclude the possibility that the banks acted independently.

The failure of the banks to consider the cost of processing NSF checks in setting their NSF fees does not eliminate the possibility that the banks considered the other three factors listed in the federal regulations plus other information in setting NSF fees. Simply because the fees are not established based on cost does not

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in light of this order.

[9] Plaintiffs attempt to challenge this explanation by claiming that it is a fallacy due to the lack of surveys to determine the degree of deterrence, the fees do not deter customers because writing bad checks is unintentional conduct, and the banks do not actually wish to deter this practice. Plaintiffs fail to support these contentions with any evidence.

[10] Additonally, the banks contend that the Zate affidavit further supports another independent, legitimate reason for the high NSF fees by demonstrating that each bank has an independent interest in increasing income from service fees. The banks, however, describe the consideration of income as maintenance of the safety and soundness of the institution.

mean that the respective banks conspired to fix the NSF fee levels. Considering the deterrence factor, the bank's competitive position and the safety and soundness of the institution are valid means of setting NSF fees. The failure of the banks to consider one factor does not require the conclusion that the banks conspired to set the level of NSF fees.

Additionally, the availability of price information between the banks also fails to exclude the possibility that the banks acted independently. The circulation of the fee levels in a retail market fails to demonstrate that the effect was a tacit collusion for all the banks to set the same fees.

Buckalew's affidavit fails to contain sufficient evidence to raise an issue of material fact. The expert merely states that under his economic analysis the only way that the banks could maintain the current NSF fees is through a tacit agreement. The expert does not allege additional facts or produce evidence to support that conclusion. He merely states that, in his opinion and under general, unspecified economic theory, defendants conspired to fix NSF fees.

Although plaintiffs' other expert, Antonio Zate, offers a more substantiated position regarding the economic motive for banks to conspire, the expert evidence simply remains as consistent with a conspiracy to fix prices as with the legitimate position of maintaining certain fee levels to deter the practice of writing checks on accounts with insufficient funds.

The court finds the plaintiffs' evidence is as consistent with legitimate interests as with illegitimate reasons for the level of NSF fees and the range of NSF fees. Because plaintiffs do not produce evidence that a trier of fact could find tended to exclude the possibility that the banks act independently in setting NSF fees, summary judgment is granted in favor of defendant banks.

IT IS SO ORDERED.

/s

JULIA SMITH GIBBONS
UNITED STATES DISTRICT JUDGE

March 11, 1994

DATE

Affidavit of Antonio Zate in support of plaintiffs' opposition to defendants' motion for summary judgment, Record No. 245: (**Note**: all statistical charts, schedules, and graphs referred to by the affiant herein and attached to the end of his affidavit in the "original" filed with the trial court have been omitted from this Appendix)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

APRIL WALLACE, VICKIE GWIN, ET. AL.

Complainants,

vs. **No. 92-2431 GA**

(1) BANK OF BARTLETT; et. al.

Defendants.

AFFIDAVIT OF ANTONIO L. ZATE IN SUPPORT
OF PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Antonio L. Zate, after having been duly sworn according to law, makes oath or affirmation as follows:

1. I am a certified public accountant with a masters degree in economics and finance in 1962. I am a managing principal of the firm **Prime Bank Advisors**, a bank management and financial consulting firm in Diamond Bar, California, which I founded in 1990 after leaving the service of the **Federal Reserve Bank** of San Francisco (Los Angeles Branch).

2. I was employed as an examiner with the Federal Reserve Bank (**FRB**) of San Francisco (Los Angeles Branch) from 1980 to 1990. As an examiner, I participated in many examinations of various banks (of different sizes and complexity) mostly in Western United States. During my tenure as an examiner, I analyzed bank operations including lending operation, revenue and expense analysis, bank reports, compliance with banking laws and regulations, bank policies and procedures, and all other data that are relevant to the overall soundness and safety of the financial institutions. I further prepared "reports of examination" which were

then submitted to the banks' board of directors and to the Board of Governors of the Federal Reserve System in Washington, D.C.

3. During my tenure as an examiner of FRB, I **brought to the attention of FRB** management, sometime in 1989, the **issue of NSF fees** being charged by some banks under the jurisdiction of the 12th Federal Reserve District. I wrote a memorandum on this issue and to the best of my recollection, the topics discussed in that memorandum were the following:

a. I questioned the apparent level of NSF fees being charged by some banks in the district **in relation to the cost of handling such NSF checks**. It was my opinion at that time that the banks' NSF fees appeared to be **grossly inflated** in relation to cost.

b. Early in 1990 in an apparent response, although indirectly, to this memo, the FRB district began examinations of banks, making comments in its report of such examinations on the effect of the banks' level of non-interest income (of which service charges on deposits, like NSF fees is a part) in relation to the banks' total revenue. It was my opinion that these comments played a major role in the apparent and subsequent **restraint** exhibited by Western banks in increasing their service charges on deposits between 1990 and 1991. Coincidentally, the result of a survey released by Sheshunoff Information Service[1] (a major provider of bank information) showed that in 1991, most major banks in the Western U.S. registered the lowest increase in service charges on deposits.[2]

c. In a clear and resounding response to the above regulatory comments, most banks in major states in the West either tempered their increase of or continued reducing service charges on deposits in the 1990 to 1991 period compared with the increase of 1989 to 1990 as illustrated below:[3]

State	1990-1991	1989-1990

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[1] in its **Bank Quarterly Ratings and Analysis** reports.

[2] Refer to comments on **"Schedule 1"**, which has been omitted from this reprint.

[3] percentage figures based on data gathered from Schedule 1. Note that several major California banks were involved in class-action lawsuits over NSF/DIR fees which had been filed in the late 70s and early 80s and which were settled in late 1987 and early 1988. Thus, California banks already began decreasing their fees in the two years before 1990.

	Increase (decrease) in Non-Interest Income	
California	(4.7%)	(4.97%)
Nevada	13.65%	80.21%
Oregon	6.52%	27.78%
Alaska	(4.57%)	(.65%)
Arizona	2.17%	19.48%
Hawaii	(5.88%)	12.82%
Wyoming	(2.22%)	2.27%

Thirty-three percent (33%) of the remaining states in the West apparently got the message of the regulator's comments and continued reducing the amount of their actual charges while another 33% substantially reduced their rate of increases in the 1990 to 1991 period.

d. In that memorandum, I also recommended that a study be conducted on the potential contingent liability of these banks in question with respect to **future lawsuits** that might be filed by consumer groups for "**possible conspiracy**" in setting NSF fees at these **artificially high** level.

e. During discussion with bank management on this NSF fee issue, the common response of local banks was that the bank needed to charge fees for their services in a "manner consistent with industry standard." **Almost all banks indicated that bankers' associations attendees discussed this issue of NSF prices at many meetings** and that the general membership was **well aware** of what everybody else was charging.

f. My recommendation was never responded to formally or officially by the FRB.

4. As a certified public accountant and with my accounting degree, I have extensive experience in **analyzing financial data of banks** as well as private enterprises. For example, during my tenure with FRB, part of my responsibility was to prepare analysis on the results of bank operation and practices and **explain the rationale** of bank management decisions. I analyzed statistics relating to bank operations using the Uniform Bank Performance Reports (**UBPR**)[4] as a regulatory guideline.

5. I have been contacted by Ira Thomas, counsel for plaintiffs herein, about testifying as an expert witness on behalf of

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[4] These are quarterly reports which all banks, including those in the present lawsuit, must file with the Federal Deposit Insurance Corporation (**FDIC**).

the plaintiffs in the above entitled case. I have reviewed (1) the two Affidavits of Allen G. Buckalew (a) in support of plaintiffs' opposition to defendants' motion for summary judgment and (b) in support of plaintiffs' argument that defendants' internal costs in processing checks are relevant to the issue herein, (2) plaintiffs' memorandum in opposition to defendants' joint motion for summary judgment, and (3) 12 CFR 7.8000, the U.S. Comptroller of the Currency's regulation on the subject of bank service charges and the factors that it recommends a bank use in setting its service charges.

a. This subject CFR reads as follows:

> In establishing deposit account service charges, the bank may consider, but is not limited to considering:
>
> (1) Costs incurred by the bank, plus a profit margin, in providing the service;
>
> (2) The deterrence of misuse by customers of banking services;
>
> (3) The enhancement of the competitive position of the bank in accord with the bank's marketing strategy;
>
> (4) Maintenance of the safety and soundness of the institution.

As I stated previously in paragraph 2, as a part of my regular duties with the FRB, I analyzed bank operations including . . . revenue and expense analysis, . . . **compliance with banking laws and regulations**, . . . and all other data that are relevant to the overall **soundness and safety of the financial institutions**. Based on my knowledge, education, and experience, it is my opinion that the amount of the banks' service bears **no rationale connection** to these four factors set out above by the U.S. Comptroller. Instead, NSF charges are arbitrarily being set at exorbitant rates to the extreme disadvantage to the customer.

6. Mr. Thomas has informed me further that each of the named defendant banks has filed an affidavit stating that they have not had any direct contact among each other so as to reach any kind of direct, active agreement or conspiracy to set prices for NSF and DIR items.

7. Based on my banking, accounting, and other professional experience, and the financial analysis I am attaching hereto (entitled: **"FINANCIAL ANALYSIS AND SCHEDULE OF DOCUMENTARY EVIDENCES IN SUPPORT OF THE CONCLUSION CONTAINED IN THE AFFIDAVIT OF**

ANTONIO L. ZATE DATED FEBRUARY 17, 1994 THAT THE DEFENDANT BANKS ACTED IN TACIT AGREEMENT NOT TO COMPETE AND TO MAINTAIN CHARGES ON NON-SUFFICIENT FUND CHECKS AT HIGH LEVEL" - with supporting Schedules 1 to 6,[5] which are all part of this affidavit), it is my opinion and I verily believe that the defendant banks herein have acted in concert and in full understanding of the relevance of their actions in setting the level of NSF charges and keeping them at the level they are today. The schedules, with their corresponding **comments and analysis** presented by me, are as follows:

Schedule 1: The ratio of U.S. banks' (nationwide) **noninterest** income (which **include NSF fees**) to total assets has continued to increase in the periods from 1989 to 1991 following the trend starting from 1979 to 1987 (as shown on **Schedules 2 and 3**)

Schedule 2: Trend of U.S. banks' (nationwide) income from service charges on deposits from 1979 to 1987. Source: FDIC

Schedule 3: Trend showing U.S. banks' declining sources of revenue from interest income and corresponding growth of banks' income from service charges on deposits-1979 to 1987. Source: Federal Reserve Board

Schedule 4: Statistics showing direct correlation of banks' level of non-performing loans to increase in non-interest income (which **include NSF fees**).

Schedule 5: Statistics showing direct correlation of declining volume of bank loans to increasing level of non-interest income (which **include NSF fees**).

Schedule 6: Table showing defendant banks' increasing trend of service charges on deposits in relation to the banks' declining volume of interest income. This trend mirrors the trend as shown on Schedules 2 and 3 (for all banks nationwide).

8. The banking industry (including the defendants herein) is a major user of computerized databases. Consequently, the defendant banks (which are mostly large regional banks) could not have missed nor could they feign ignorance of the one important trend in this entire industry, that is, that the banking industry's major source of income, interest "income on" loans and investments, has been declining for years (beginning in the early 80s) **due primarily to competition for this business** while "non-interest income sources" - such as **NSF and DIR charges** - have been **increasing** during the same period, **made possible by the**

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[5] All of these 6 **"Schedules"** have been omitted from the Appendix.

coordination among banks, the defendants herein included, not to compete and thereby maintain extraordinarily high profits on such sources. On the issue of NSF checks, it is interesting that the Consumer Federation of America pointed out recently that the banking industry in **1992 alone** had a **whopping $3.67 billion in profits** (non-interest income) from bounced checks. It is my educated and professionally-gained opinion that this enormous profit and its trend **would not have been possible in such a huge and powerful industry without the mutual, concerted efforts of its members.** As a former bank regulator, I was a living witness to this trend.

9. Assuming all of the above and further assuming that defendant banks ultimately furnish information of their actual costs in processing NSF checks as requested by plaintiffs in this case, I can testify that based on my interaction with banks I examined during my tenure as a bank examiner and my continuing interaction in the banking industry as a management and financial consultant, that the defendant banks have an "interest in common" (that is to mutually and collectively maintain high levels of non-interest bank income to compensate for the declining source of revenue from interest income due to "supply and demand" competitive forces) by **artificially** setting NSF and DIR charges at the current level by **coordinated** means rather than by normal competitive market factors, which would cause the charges to be substantially reduced.

10. Through the forum of bankers' associations, increasing efficiency of dissemination of computerized data and databases, and easy access to industry-wide publications, defendant banks have obviously acted in coordinated efforts to maintain the outrageous level of NSF fees. These banks know that the NSF fee is one source of income that non-bank financial institutions (who have invaded their market for all kinds of financial products for the last several years) cannot compete against because such non-bank financial institutions are not allowed by law to accept deposits.

11. Obviously, the defendant banks herein - and as a matter of fact, all banks - have an overriding objective of protecting this one bastion of their industry and solid source of income, the NSF fees.

12. In summary, it is my opinion that the trend of increasing income from service charges on deposits (including NSF fees) "has been going on for so long" (a plus factor in determining "conspiracy") and these charges are such major components of income in the banking industry, of which the defendant banks are a major part, that **tacit agreement not to compete** in setting these

charges and to maintain their level at artificially exorbitant rates are **almost given facts**. This trend could **not** have occurred in such a worldwide industry **without a sustained and concerted effort** by those that manage the industry!! No reasonable mind could be so naive to think otherwise!! It is **only through concerted** effort that something of this magnitude can be accomplished.

13. The overriding objective of all banks, including the defendants herein, is indeed to maintain and increase that one source of revenue that can compensate them for the loss of income from more traditional competitive sources. The trend as articulated in all the analyses presented above is so pervasive and overwhelming and **came about as a direct result of the concerted effort of the whole banking industry including the defendant banks.** UNFORTUNATELY, THE VICTIM OF THIS CONCERTED EFFORT IS THE AMERICAN CONSUMER WHO **HAS NO ALTERNATIVE** BUT TO PAY THE OUTRAGEOUS PRICE CHARGED FOR THE BANK SERVICES.

14. I have immediately hereafter set forth three (3) separate **Analyses** which I have done using the **Uniform Bank Performance Reports (UBPR)** on each of the nine banks herein for the most recent quarter and the **Call Reports** for the last twelve quarters (1991 through 1993) for each of these same nine banks in order to support my conclusions above. These analyses contain further opinions of mine therein and are incorporated herein the "main body" of this Affidavit by reference.

"FINANCIAL ANALYSIS AND SCHEDULE OF DOCUMENTARY EVIDENCES IN SUPPORT OF THE CONCLUSION CONTAINED IN THE AFFIDAVIT OF ANTONIO L. ZATE DATED FEBRUARY 17, 1994 THAT THE DEFENDANT BANKS ACTED IN TACIT AGREEMENT NOT TO COMPETE AND TO MAINTAIN CHARGES ON NON-SUFFICIENT FUND CHECKS AT HIGH LEVEL"

[redacted]

ANALYSIS #1:

Bank management, in the whole banking industry, knows that noninterest income (which includes service charges on deposits, a major item in the **Call Reports**,[6] including **NSF fees**) is a growing source of bank income in this era of low interest rates. Banks must find other sources of income to compensate their declining source from interest income brought about by declining loan volume and low interest rates. Statistics and widely-circulated publications available to bankers all over the nation have shown the trend of declining banks' revenue from interest and investment income and the growing revenue from fees charged for other banking services. As shown on "**Schedule 1**," which is a survey released by **Sheshunoff Information Service** (a major provider of bank information), banks' yields on loans or interest income (expressed as a percentage of bank assets) all across the United States from 1989 to 1991 and following the trend from 1979 to 1987, have been declining steadily while non-interest income (expressed as a percentage of assets) from fees for other bank services more particularly service charges on deposits including NSF fee have continued to grow during the same period. This trend is validated by public data from the Federal Deposit Insurance Corporation (FDIC) as shown on "**Schedule 2**." The FDIC data pointed out that all U.S. banks' service charges on deposits (**including NSF fees**) were about $2.517 billion in 1979 and increased to $8.655 billion in 1987, **a whopping 244% increase in 10 years, or an average of 24% per year**. To confirm this trend, the Federal Reserve Board public data, shown on "**Schedule 3.**" indicates that banks' source of

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[6] Like the UBPR, these are quarterly reports which the banks, including the defendants herein, must file with the FDIC. They do not contain as detailed analysis as is contained in the UBPR.

revenue from fees for other services as a percentage of total revenue have increased by 66% while traditional income from loans and investments have declined 16% during the same period. **THIS TREND COULD NOT HAVE CONTINUED FOR 10 LONG YEARS AND AT SUCH A STEADY PACE WITHOUT THE "TACIT COORDINATION" OF BANKS IN THE INDUSTRY.** Such a prolonged and uninterrupted trend in the growing share and importance of service charges on deposits as a major source of bank revenue **provide undisputed proof of the concerted effort** of the whole industry **(including the defendant banks in this case)** to preserve this source of income.

Alarmed with this trend and in a stunning rebuke of the industry's practice, the Consumer Federation of America, a major consumer interest group, released a report gathered from public data that showed the industry earning a staggering $4.35 billion of fees from bounced checks in 1992 alone. The Federation further stated that the banks had nearly **$3.67 billion profits** from these fees which **conservatively** totaled more than six (6) times the industry cost of handling these checks.

The trend as shown on **Schedule 1**, and more particularly articulated on **Schedules 2** and **3**, is a direct result of the banking industry, **including the defendant banks herein**, "working together" and in "complete understanding" of the benefits that will be derived from their concerted efforts. They desire to use the "NSF FEES INCOME" to compensate them for the loss from other traditional "income."

ANALYSIS #2:

In periods of declining loan demands coupled by high level of non-performing loans, banks are "highly motivated" to find and maintain other sources of revenue to preserve and/or improve their existing profit margin. As illustrated on **Schedules 4** and **6**,[7] banks in states that experience severe decline in loan demands or have negative loan growth exhibited substantial increase in non-interest income (**which include NSF fees**). In addition, banks in states that experienced high level of non-performing loans also registered substantial increases in noninterest income (**which include NSF fees**). It is also interesting to note that in the State of Tennessee where the defendant banks are domiciled, the State banks experienced a low level of non-performing loans and yet the State banks average increase in non-interest income (**which include NSF**

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[7] infra, Pages ? and ? respectively.

fees) is higher than the average increase of such income by other state banks that also experienced similar low levels of non-performing loans.

It is indeed very obvious that the response (by maintaining non-interest income at high level including NSF fees) of the banking industry (**of which the defendant banks are major players in their respective locale**) to the factors that adversely threatened their sources of revenue is a **UNITED** action borne out of **"tacit coordination"** to preserve and maintain profit margin. During my 10-year at FRB and in all my 30 years in the banking industry, I have observed that bankers all over this country and all over the world will **"band together"** to preserve their sources of revenue. In this particular case of non-performing and slow demand for loans, all banks, including the defendant banks, realized that their income had diminished and therefore, they had to maintain existing sources of other revenue "at all cost." They cannot afford to do otherwise. They realized (without the need to talk to each other) by "common interest" that NSF fees are existing sources of income they cannot afford to lose in times like this.

ANALYSIS #3:

The data shown on **Schedule 6** confirmed the fact that the defendant banks herein (with the exception of one, Bank of Bartlett[8]) were indeed part of the broad trend of banks' increasing non-interest income (**which include NSF fees**) as articulated on **Schedules 2** and **3**[9] and analyzed under **Analysis #1**. As illustrated on **Schedule 6**, all defendant banks (with the exception of one) showed decreasing level of interest income during the period from 1990 to 1992 while levels of service charges on deposits (which include NSF fees) were increasing. Indeed, the defendant banks were and continue to be a part of the broad trend of the banking industry, which trend can be summarized as "AN ERA OF DECLINING LEVEL OF INTEREST INCOME ACCOMPANIED BY INCREASING LEVEL OF NON-INTEREST INCOME (INCLUDING SERVICE CHARGES ON DEPOSITS SUCH AS NSF FEES). This trend could not have occurred in such a worldwide industry without a sustained and concerted effort by those that manage the industry!! No reasonable

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[8] As indicated in the "Notes" to "Schedule 6" (see Page ? infra), this bank is a candidate presently to be placed under federal regulatory sanctions, which means it is a problem bank.

[9] infra, Pages ? and ? respectively.

mind could be so naive to think otherwise!! Consequently. for the defendant banks herein to claim that they did not, by means of "tacit agreement or cooperation" among each other, agree not to compete on such charges and maintain them at present levels, would be a mockery of common sense. It is only through concerted effort that something of this magnitude can be accomplished.

I can and am willing to testify to the above and all subsequent Analyses and Schedules if called as a witness in this matter. And further, affiant saith not.

/s
ANTONIO L. ZATE

Affidavit of Allen G. Buckalew in support of plaintiffs' opposition to defendants' motion for summary judgment, Record No. 178:

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

APRIL WALLACE, VICKIE GWIN, ET. AL.

Complainants,

vs. **No. 92-2431 GA**

(1) BANK OF BARTLETT; et. al.

Defendants.

AFFIDAVIT OF ALLEN G. BUCKALEW IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Allen G. Buckalew, after having been duly sworn according to law, makes oath or affirmation as follows:

1. I am an economist with a Master of Science degree obtained in 1977. I am a principal of the firm of J.Wilson & Associates in Washington, D.C.

2. I have participated as an expert witness and consultant in many judicial proceedings including several federal and state antitrust proceedings. For example, I testified as an expert witness on behalf of the Department of Justice in the AT&T antitrust case. I was employed with the FCC from 1975-79. I am most familiar with the parameters and workings of the Sherman Antitrust Act. My 27-page Curriculum Vitae has previously been filed with the Court on December 2, 1993 as an Exhibit to my affidavit on another issue in this cause.

3. As stated therein, I have been contacted by Ira Thomas about testifying as an expert witness on behalf of the plaintiffs' claim in the above styled case. I have reviewed the original complaint along with four depositions which Mr. Thomas has taken of bank personnel, two each from First Tennessee Bank and National Bank of Commerce. I have reviewed 12 CFR 7.8000, the U.S. Comptroller's regulation on the subject of bank service charges and the factors that it recommends banks use in setting charges. I have also reviewed a chart of the defendants' pricing

history for NSF charges over the past six years prepared by Mr. Thomas.

4. I have reviewed several of the pleadings which Mr. Thomas has recently filed in this matter setting forth plaintiffs' legal positions regarding tacit collusion, of which theory I am familiar based on both my educational training and professionally-gained experience.

5. Mr. Thomas has informed me that each of the named defendant banks has filed an affidavit stating that they have not had any direct contact among each other so as to reach any kind of direct, active agreement or conspiracy to set their prices for NSF and DIR items.

6. It is my understanding that plaintiffs have requested that each defendant furnish to them the bank's cost data relating to the expenses incurred in running their check processing centers and the revenue derived from their various forms of regular flat fee checking account charges. Defendants have refused to furnish any such information. I have been informed that the reason stated for such refusal is that defendants do not set their NSF/DIR charges in relation to their cost and that they have maintained from the beginning that costs are irrelevant to the allegations in the complaint since the complaint charges them with price fixing. As I stated in my previous affidavit, cost information is certainly not only relevant to any case wherein defendants have been charged with price fixing, it is absolutely essential.

7. Based on my experience, tacit collusion or conscious parallelism, in and of itself, is not illegal (see, for example, Theater Enterprises, Inc. v. Paramount Film Distributing Corp., 364 U.S. 537 (1954), however, this behavior can indicate illegal activity if other facts are present. For example, an unlawful conspiracy would be indicated if the tacit collusion (similar prices) is coupled with simultaneous and substantial price increases unexplained by any increase in cost.

8. For example, assume for purposes of defendants' motion for summary judgment that the cost of the individual banks ranges between $.15 to $1.50 per occurrence. Why are the rates the same and why has there been substantial increases in the price for NSF services?

9. Assuming all of the above, and further assuming that defendants have historically totally failed to openly compete in the market for customers on the basis of more attractive NSF charges, I can testify that based on well-accepted economic theories dealing with supply and demand in our American economy, defendants have

been able to maintain these artificially excessive NSF/DIR charges by means of a tacit agreement not to compete on such charges and to set the prices at the inflated amounts which they presently are.

And further, affiant saith not.

DISTRICT OF COLUMBIA:

This is to certify that the person whose signature appears below, appeared before me, a notary in the county and state above evidenced, and made affirmation and/or oath that he/she is in fact the person named.

/s/
ALLEN G. BUCKALEW

Headline article from the "MONEY" section in the September 8, 1995 issue of **USA TODAY**:

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VIA SATELLITE — THE NATION'S NEWSP — SECTION

USA TODAY

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In The

Supreme Court of the United States

October Term, 1995

MARGARET M. BAKER, et al.,

Petitioners,

v.

BANK OF BARTLETT, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' JOINT BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Did the Sixth Circuit Court of Appeals act correctly in affirming the granting of summary judgment in favor of the Respondent Banks?

LISTING OF PARENT COMPANIES AND SUBSIDIARIES PURSUANT TO RULE 29.1

Respondent Boatmen's Bank of Tennessee is a wholly owned subsidiary of Boatmen's Bancshares, Inc.

Respondent First American National Bank is a wholly owned subsidiary of First American Corporation.

Respondent Union Planters National Bank is a wholly owned subsidiary of Union Planters Corporation.

Respondent Leader Federal Bank for Savings is a wholly owned subsidiary of Leader Financial Corporation.

Respondent National Bank of Commerce is a wholly owned subsidiary of National Commerce Bancorporation.

Respondent Bank of Bartlett is a wholly owned subsidiary of West Tennessee Bancshares, Inc.

Respondent NationsBank of Tennessee, N.A. is a wholly owned subsidiary of NB Holdings Corporation. NB Holdings Corporation stock is owned by NationsBank Corporation, a publicly traded corporation. NationsBank of Tennessee, N.A., owns 100% of Commerce Place Company and Commerce Trading Corporation, neither of which is publicly traded.

Respondent Tri-State Bank of Memphis has no parent companies.

Respondent First Tennessee Bank National Association is a wholly owned subsidiary of First Tennessee National Corporation.

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Supreme Court Rule 10 4

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RESPONDENTS' JOINT BRIEF IN OPPOSITION

The Respondents respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the opinion of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 55 F. 3d 1166 (6th Cir. 1995), and is reprinted in Petitioners' Appendix at pages 2a to 9a. The decision of the United States District Court for the Western District of Tennessee is reprinted in Petitioners' Appendix at pages 10a to 19a.

STATUTE INVOLVED

Title 15. COMMERCE AND TRADE, CHAPTER 1. MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE, 15 U.S.C. § 1.

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be

punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

COUNTERSTATEMENT OF THE CASE

Plaintiffs filed the instant lawsuit against nine banks doing business in the State of Tennessee (the "Banks"),[1] alleging that the Banks conspired or agreed, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, to fix the amount of certain fees charged to Bank customers. At issue are the amounts the Banks charge customers for writing checks into overdraft ("NSF") and for depositing checks that are returned uncollected ("DIR").[2] The Banks

[1] This Joint Brief in Opposition to the Petition for Writ of Certiorari is filed on behalf of Respondents Bank of Bartlett; Boatmen's Bank of Tennessee; First American National Bank; First Tennessee Bank National Association; Leader Federal Bank for Savings; National Bank of Commerce; NationsBank of Tennessee, N.A.; Tri-State Bank of Memphis and Union Planters National Bank.

[2] In establishing all customer service charges (including NSF and DIR charges), the Banks considered, among other things, one or more factors of 12 C.F.R. § 7.8000 promulgated by the United States Office of the Comptroller of the Currency ("OCC"). This regulation permits banks throughout the national banking system to exercise their sound judgment in making business decisions to set service charges. In doing so, a bank may, but is not required to, consider several factors, including its costs plus a profit margin; deterrence of misuse by customers of banking services; enhancement of its competitive position in accord with its market strategy; and maintenance of the safety and soundness of the institution.

denied the existence of any conspiracy or agreement to fix or maintain such fees, and moved for summary judgment.

Plaintiffs admitted that they had no direct evidence of any agreement or conspiracy among the Banks to set prices but contended that the charges were so similar throughout the banking community as to amount to parallel pricing. *See, e.g.*, R. 159, Ex. 27, Deposition of Bradley Freiden, p. 32; Petitioners' Appendix, p. 4a. They argued that a sufficient inference of conspiracy existed to overcome summary judgment because the Banks (1) had a profit motive; (2) in large measure, did not consider cost as a factor in setting NSF and DIR fees; and (3) published and released to their customers and into the community their NSF and DIR prices. In opposition to the summary judgment motions, plaintiffs also submitted two "expert" affidavits. Petitioners' Appendix, pp. 20a-30a; 31a-33a. In large measure, the affiants merely stated that, based on the pleadings of the plaintiffs and their experience, it was their opinion that a conspiracy existed among the Banks. These opinions had no basis in fact, were completely unsupported by the record and actually ignored the undisputed facts placed into the record by the Banks.

The Banks denied that any conspiracy, explicit or tacit, existed among the Banks and supported their motions for summary judgment with affidavits setting forth the bases on which they made decisions in setting NSF and DIR fees. R. 140, 143, 144, 146, 147, 148, 150, 152, 153, 154, 155, 161. Each Bank established that its pricing decisions were made independently.

Based on the record before it, the district court granted summary judgment in favor of the Banks. Petitioners' Appendix, pp. 10a-19a. The Sixth Circuit affirmed, finding that the Petitioners had failed to present sufficient evidence to exclude the possibility that the Banks were pursuing legitimate independent business interests. Petitioners' Appendix, pp. 2a-9a.

REASONS WHY THE PETITION SHOULD BE DENIED

It is a familiar proposition that a Petition for a Writ of Certiorari "will be granted only when there are special and important reasons therefor." Sup. Ct. R. 10. In cases such as the present one, this normally requires that

> a United States court of appeal has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; . . . [or] has decided a federal question in a way that conflicts with applicable decisions of this Court.

Sup. Ct. R. 10.1(a), (c).

None of the issues raised in the Petition satisfy this Court's stringent requirements for granting a writ of certiorari.

I. THE DISTRICT COURT AND THE SIXTH CIRCUIT APPLIED THE CORRECT STANDARD FOR SUMMARY JUDGMENT AND SUMMARY JUDGMENT WAS PROPERLY ENTERED IN FAVOR OF THE BANKS.

The district court in this case properly entered (and the Sixth Circuit properly affirmed in a unanimous decision) summary judgment in favor of the Banks. Petitioners failed to come forward with any evidence that would tend to exclude the possibility that the Banks acted independently. No genuine issue of material fact existed in this case to preclude summary judgment in favor of the Banks, and nothing in the record would have allowed a reasonable juror to find in Petitioners' favor under the legal standard established by this Court's prior decisions in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), and *Monsanto v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984).

The Petitioners argue that the lower courts ignored this Court's decision in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992). The holding in *Eastman Kodak* is not applicable to the issues presented in this case. In *Eastman Kodak* the defendant company manufactured and sold photocopiers and micrographic equipment. The defendant also sold service and noncompatible replacement parts for such equipment and was accused of unlawfully tying the sale of service for its equipment to the sale of parts in violation of section 1 of the Sherman Act. Direct evidence was presented of the tying arrangement between the sale of service and parts. 504 U.S. at 456-58, 463, 477. Despite this direct evidence of anticompetitive behavior, the defendant in that case contended

that it lacked the market power necessary for a Sherman Act violation. In particular, the defendant alleged that its lack of market power in the primary copy equipment market precluded as a matter of law the possibility of market power in the derivative service and parts market. This Court disagreed with defendant's argument and found a genuine issue of material fact as to the defendant's market power in the service and parts aftermarket, affirming the denial of summary judgment. In the present case both the district court and the Sixth Circuit determined there was a lack of evidence to exclude the possibility that the Banks acted independently.

The *Eastman Kodak* case did not change the legal standard established by this Court in *Matsushita* and *Monsanto* for summary judgment in antitrust conspiracy cases. As the Court held in *Matsushita*, "[A]ntitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case. . . . [C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. . . . To survive a motion for summary judgment . . . a plaintiff seeking damages for a violation of § 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Matsushita*, 475 U.S. at 588 (quoting *Monsanto v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984)). The Sixth Circuit and the district court followed the above legal standard in the present case, and their decisions do not conflict in any way with decisions of this Court or other courts of appeals. Certiorari is therefore not available to Petitioners on that basis.

II. PETITIONERS PRIMARILY RAISE ONLY FACTUAL ISSUES THAT ARE INAPPROPRIATE FOR REVIEW BY CERTIORARI.

The only real question Petitioners raise is not a legal issue regarding the correct standard for summary judgment but a factual issue. In essence, Petitioners ask this Court to make a third review of the summary judgment record to see if it can find what two previous courts have been utterly unable to find – proof of a conspiracy to fix NSF and DIR fees. This Court has ruled that such fact canvassing is not a task to be served by a grant of certiorari. *See, e.g., NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 503 (1951) ("This is not the place to review a conflict of evidence. . . . "); *General Talking Pictures Corp. v. Western Electric Co., Inc.*, 304 U.S. 175, 178 (1938) ("Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it."); *United States v. Johnson*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.") Notwithstanding Petitioners' exaggerated references in their brief to the number of grains of sand in all the beaches of the world and the atoms in the universe, the present case is no more significant or important than any other summary judgment case that is decided on a factual record. Accordingly, certiorari should be denied.

CONCLUSION

The Petition does not present any questions that warrant review by this Court, and there are no "special and important reasons" for this Court to issue a writ of certiorari. For the foregoing reasons, Respondents submit that the Petition for Writ of Certiorari to the United States States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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No. 95-710

In The

Supreme Court of the United States

October Term, 1995

MARGARET M. BAKER, ET AL,

Petitioners,

v.

BANK OF BARTLETT, ET AL,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY TO RESPONDENTS' JOINT BRIEF IN OPPOSITION

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ARGUMENT 1

PETITIONERS' REPLY TO CONTENTIONS RAISED BY RESPONDENTS IN THEIR "JOINT BRIEF IN OPPOSITION" 1

1. One reading the respondents' brief would be fallaciously led to believe that discovery was complete and the case ready for trial when summary judgment was granted. 1

2. The defendants keep emphasizing "facts" when the case was dismissed without affording the plaintiffs the opportunity to develop such facts so as to have the opportunity to refute the totally conclusory contentions advanced by the banks. Further, the defendants never introduced any facts into the Record at all, instead only filing conclusory affidavits which they failed totally to corroborate with any admissible "evidence". 4

3. Respondents' contention that Petitioners are raising factual issues before this Court rather than a legal issue concerning the standard for summary judgment is totally off base. 8

CONCLUSION 9

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Pursuant to Rule 15.6 of the Rules of the Supreme Court of the United States, effective October 2, 1995, the Petitioners respectfully submit this "REPLY BRIEF'.

ARGUMENT

PETITIONERS' REPLY TO CONTENTIONS RAISED BY RESPONDENTS IN THEIR "JOINT BRIEF IN OPPOSITION"

1. One reading the respondents' brief would be fallaciously led to believe that discovery was complete and the case ready for trial when summary judgment was granted.

The Respondents have totally mischaracterized the procedural point at which this case stood when it was dismissed summarily. The entire focus of Respondents' brief is to make it appear that discovery was complete in this case and that the case was thus "ready for trial" when it was disposed of upon motion for summary judgment approximately two years after it had been filed. Of course, that would be the natural conclusion for an appellate court to draw when seeing that summary judgment was granted two years after a case was filed. Nothing could be further from the truth. To the complete contrary, the Petitioners have been thoroughly stifled by these defendant banks from even getting started at discovery! For all practical purposes, no meaningful discovery whatsoever had been allowed to the Petitioners. In fact, summary judgment was granted while Petitioners' year-old *motion to compel* discovery was pending.

Rather than to resolve all factual disputes in favor of the motion's opponent as the law requires, the trial court's reasoning in granting summary judgment was conditioned upon an assumption by the court that plaintiffs' experts would not be able to back up their affidavit opinions even if they obtained the documentary proof being sought by plaintiffs' *Request for Production*. The court thus granted summary judgment without even giving plaintiffs the

opportunity to engage in discovery to corroborate their case! Plaintiffs stipulated that the trial court could rule on defendants' motions for summary judgment without resolving the pending *motion to compel* because had the trial court correctly applied the standards for summary judgment, it would have been forced to rule that the pretextual affidavits filed by the defendants were undoubtedly insufficient to carry their burden for purposes of summary judgment. Once this *motion* was denied, then discovery would have finally proceeded so as to enable the plaintiffs to pursue their case and prove the tacit collusion between the defendants with sufficient evidence to satisfy the court.

That is why the ruling of the lower courts is so glaringly erroneous. The ruling is exactly the opposite of how summary judgment standards are to be applied, even in tacit antitrust cases. The defendants filed conclusory, pretextual affidavits which were **totally unsupported by any documents** to support their motion for summary judgment. The plaintiffs countered this with **meaningful, detailed** affidavits by very competent expert witnesses. The internal bank documents which these experts needed to corroborate their opinions were withheld by the defendants and the plaintiffs immediately moved to file a *motion to compel.* While this stalemate was pending, the trial court granted summary judgment, solely because plaintiffs' experts had no documentary proof/evidence to corroborate their opinions! The court reasoned that it would be too speculative to allow the case to go to a jury without plaintiffs having a case based on more concrete documentary evidence when it was the court's own ruling that denied plaintiffs the opportunity to develop and generate such proof. The trial court's interpretation that Matsushita supported its decision was incorrect as the present case has one critical element which the court found lacking in Matsushita, the **motive** to conspire.

Respondents state at page 3 of their *Joint Brief in Opposition* (hereinafter referred to as "*Joint Brief*") that the *"plaintiffs admitted that they had no direct evidence of any agreement or conspiracy among the Banks to set prices."* It is true that this class action case was filed on the basis of **tacit** collusion rather than proof of a direct agreement to set prices. The issue that this appeal deals with is **most important**. This cases gives this Court an ideal opportunity to clarify confusion among the lower courts as to just how much

"proof" is required to overcome summary judgment in a tacit collusion case, to further the attempts which have been made in Matsushita and Eastman Kodak but which apparently still need "fine tuning."

Respondents attempt to downplay the significance of this case by concluding (their) argument at the bottom of page 7 of their *Joint Brief* that *"the present case is no more significant or important than any other summary judgment case that is decided on a factual record."* Petitioners would submit that it can not be repeated enough that the present case is probably not only the most important consumer rights case to affect the citizens of the State of Tennessee in the past twenty-five years but the citizens of this entire country as well, not just the defendants herein as the same situation of parallel pricing by banks on these subject check processing fees permeates every locality. A victory by the plaintiffs herein will be felt by every single bank in this country. Certainly then, the present case is more important than the typical summary judgment cases that are decided by the courts of this country each day. If significance and importance to the American public were the only criteria used by this Court to determine whether to grant cert, this case would accordingly head the list of those cases which this Court determined to hear.

In this case, the reason why the plaintiffs have not been able to put any documentary "evidence" or "proof" into the Record at present is because - as hard as this may seem - the defendants have not come forward to produce even one document that has been requested of them by the plaintiffs in their "First Set of Interrogatories and Requests for Production" which was served on the defendants together with service of the *Complaint*. When the defendants failed to adequately answer these, the petitioners filed a *"motion to compel."* After months and months of pleadings and counter-pleadings with respect to plaintiffs' motion to compel production of these documents, in December of 1993, the Magistrate finally (conditionally) ordered the defendant banks to turn over these documents, which if done, would have finally started the "discovery" process. However, the defendants filed "motions to clarify" with respect to this Order and ultimately, then appealed the Magistrate's ruling to the presiding judge. While this motion was pending, summary judgment was granted.

Ultimately, when discovery is complete, the plaintiffs will not only be able to furnish the trial court the "evidence" it ruled was needed to prevail against summary judgment in this type of action, but further, perhaps even obtain through discovery from one of the defendants' employees who are involved with processing checks an admission of a direct agreement among the banks! Of course, antitrust case law clearly states that such direct evidence is not necessary to even prevail at trial, and thus certainly not necessary to withstand a motion for summary judgment! The lower courts herein have misinterpreted Matsushita to require the plaintiffs in a tacit price-fixing collusion case to present far more evidence at this stage of the proceeding than is required to withstand the motion for summary judgment, especially when the defendants accused have a great, overwhelming motive/incentive to participate in the alleged collusion as the banks do here.

2. *The defendants keep emphasizing "facts" when the case was dismissed without affording the plaintiffs the opportunity to develop such facts so as to have the opportunity to refute the totally conclusory contentions advanced by the banks. Further, the defendants never introduced any facts into the Record at all, instead only filing conclusory affidavits which they failed totally to corroborate with any admissible "evidence".*

Toward the end of the first full paragraph on page 3 of their *Joint Brief*, defendants contend that plaintiffs' expert affiants have

> "merely stated that, based on the pleadings of the plaintiffs and their experience, it was their opinion that a conspiracy existed among the Banks. These opinions had no basis in fact, were completely unsupported by the record and actually ignored the undisputed facts placed into the record by the banks."

After first pointing out that the defendants make no attempt at all to explain what "undisputed facts placed into the record" they are

referring to,[1] counsel for plaintiffs would now respond in order to each of these arguments.

a) "based on the pleadings of the plaintiffs and their experience, it was their opinion that a conspiracy existed among the Banks."

Apparently, the point of defendants' criticism is that plaintiffs' experts' opinions are based solely on their review of the "pleadings" as opposed to a review of "something else." However, in this case, since the defendants stymied plaintiffs' attempts to obtain the documents from defendants, there was nothing else but the pleadings for such experts to base their affidavit testimony upon. These pleadings consist of the 1) Complaint, 2) defendants' respective Answers to Complaint, and 3) Answers to Plaintiffs' Interrogatories and Requests, wherein the defendants make pathetically pretextual attempts to explain the manner in which they arrived at their NSF pricing structure independent of what each of the other banks was doing. But this procedure, filing expert affidavit opinions based on the pleadings to date, is exactly what summary judgment is all about! Because the defendants have failed to furnish any documentation sought by these experts to substantiate their opinions, plaintiffs' experts have nothing else to rely on in the posture in which the case presently stands.

Here, the trial judge did indeed find that there was a prima facie case of price-fixing on the basis of "the pleadings." These "pleadings" included the one and only "document" which the banks attached to their Answers to Interrogatories and Requests; that is, the price rate sheet which each defendant bank leaves at the bank teller counter (and other places in the lobby of the bank) to inform the public of their prices, which prices the trial court found amounted to prima facie evidence of similar pricing under the antitrust law. Nonetheless, the trial court then went on to hold that there was not enough "proof" from which a jury could find that the inference of collusion so as to achieve these remarkably similar prices was greater than the inference that such prices were attained by independent action. Plaintiffs' experts, on the other hand, persons

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[1] because the defendants have indeed failed to so place any such "facts" into the Record.

with vast experience in antitrust and banking areas, stated under oath that they could explain to the jury how it was virtually impossible for the defendants to maintain their complained-of prices without some form of collusion. These experts of course had no documents to corroborate what they offered to explain because the defendants refused to produce the very documents which these experts said would do just that, substantiate their theories!

b) "These opinions had no basis in fact"

As just explained, plaintiffs experts did not have proof of a direct conspiracy but did have all the "facts" they needed to testify under oath by affidavit that the defendants could not maintain the prices which they reviewed without resorting to tacit collusion. They stated that the defendants absolutely could not arrive at such prices by independent action. Thus, plaintiffs' experts' opinions were indeed "based on the (limited) facts" which were made a part of the Record at the time. Defendants successfully withheld the documents which these experts wished to see by appealing the Magistrate's Order to produce such documents and now want to fault these experts for not relying on more facts in the Record when it is they who refused them access to such "facts". The trial judge was thus obligated to apply the principles of law for summary judgment that mandate that all factual disputes be resolved in favor of the motion's opponent.

c) (said opinions were) "completely unsupported by the record"

Again, the defendants do not explain how these experts' opinions differ from anything in the Record because it's a completely false contention. To the contrary, plaintiffs' experts' opinions were supported by the Record because that is exactly what they based their opinions on, the very limited documents which were filed by the defendants themselves as attachments to their *Answers to Interrogatories.* Certainly the defendants do not mean that plaintiffs' experts' opinions were unsupported by the Record because they were contrary to the self-serving affidavits filed by each bank's representative wherein they swore that they did not collude with representatives from the other area banks in setting their NSF prices!

d) (said opinions) "actually ignored the undisputed facts placed into the record by the banks"

This contention was briefly alluded to supra, page 4. At the risk of repetition, there is not even the slightest attempt by the defendants in their *Joint Brief* to explain what "undisputed facts" they are referring to. The reason is because, again, it is false; there are no such "undisputed facts" in the Record. In fact, the defendants placed no facts whatsoever in the Record except the rate charts which showed how much they were charging for NSF and DIR services. And on the basis of same, the trial court found prima facie evidence of illegal price-fixing!

In the last paragraph on page 3, defendants contend that they *supported their motions for summary judgment with affidavits setting forth the bases on which they made decisions in setting NSF and DIR fees.* As was explained in the petitioners' Petition for Writ of Certiorari herein, the defendants never explained any bases at all for how they set these subject fees. Instead, they submitted affidavits which contained totally **conclusory** statements that they do not collude but were then glaringly unable to explain how they arrived at such fees either in writing or in deposition.[2]

Even more remarkably, the defendants' next sentence makes claim that *each bank **established** that its pricing decisions were made independently.* The "fact" is that the banks "established" nothing. They were offered the opportunity in answering this very questions posed to them by Interrogatory to explain rationally how they set their prices and failed woefully, offering absolutely nothing but pretextual, conclusory statements. Certainly, the defendants are not suggesting that their affiants' conclusory statements that they do not engage in collusion with other banks and that they set prices independently constitute "undisputed facts." If that were true, then plaintiffs' experts' opinions would likewise be entitled to be classified as "undisputed facts."

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2 Excerpts from these limited depositions were cited in petitioners' Petition.

3. Respondents' contention that Petitioners are raising factual issues before this Court rather than a legal issue concerning the standard for summary judgment is totally off base.

At the top of page 7 of their *Joint Brief*, defendants contend that

> "The only real question Petitioners raise is not a legal issue regarding the correct standard for summary judgment but a factual issue."

Defendants then cite this Court to three cases that stand for the principle that this Court's purpose is not to make a third review of the facts so as to see if there are sufficient facts to find "proof" of a conspiracy. It should be obvious from Petitioners' original Brief and the contents earlier in this Reply Brief that the Petitioners have never so much as even suggested that this Petition is based on some error in the lower courts' review of the facts, as defendants here contend. Instead, the Petition makes it clear throughout that it is based on the lower courts' error in applying the law to the Record in the posture in which the present case stood at the time summary judgment was granted.

The above cited contention of the defendants is rather astonishing in light of the fact that it is totally contrary to the correct synopsis of the basis for plaintiffs' Petition. It represents the defendants' tactics in successfully camouflaging the real issue before both lower courts so as to obtain the ruling in their favor, and now attempting to distort same before this Court, so that they can again circumvent justice. An admission that this Petition is based on the legal standards to be applied in summary judgment can lead only to the conclusion that the lower court decisions were clearly in error under both Matsushita and Eastman Kodak. Plaintiffs do not ask this Court to review the lower courts' review of the facts because as has been explained supra, plaintiffs have been denied the opportunity thus far to develop any facts. When the plaintiffs' attempts to develop such facts ran into the defendants' roadblock, and a *motion to compel* was pending, the trial court made a remarkable assumption, in effect choosing to assume that plaintiffs would not be able to ever successfully develop such facts! Plaintiffs appeal to the appellate court was based on the argument that the

trial court incorrectly applied the proper legal standard for summary judgment in a tacit price-fixing case. Likewise, the Petition to this Court is based on the same legal issue that the appellate court fell into the same trap and incorrectly applied the standard for deciding summary judgment to the present case based on the posture in which it stood when summary judgment was granted. The only role which facts have had in the present case is that the trial court failed to assume the facts favorable to the plaintiffs' position as it was required to do under the principles for ruling upon a motion for summary judgment, instead doing entirely the opposite. Plaintiffs do not ask this Court to make a third review of the facts as defendants assert as that would indeed not be the proper type of issue to raise before this Court in a Writ for Certiorari.

CONCLUSION

The importance of this case can not be overemphasized. Defendants argue that this is a "run of the mill" everyday summary judgment case dismissed on the factual record which the appellate courts see hundreds of times each year when it is unequivocally the most important case each bank has faced since its inception. The potential class affected represents hundreds of thousands of persons with several hundred million dollars at stake! The defendants contend that the decision is not adverse to any decision out of the other circuits nor in conflict with any prior decision of this Court. Defendants contend that the decision is not in conflict with the 1992 ruling by this Court in Eastman Kodak when in fact it is in direct conflict. Defendants attempt to distinguish the present case from Eastman Kodak by pointing out that the plaintiffs there had much more concrete evidence to support their case. However, the point which Eastman Kodak would make to this case is that the plaintiffs here are entitled to be afforded the opportunity to develop that proof and not be thwarted at this point by summary judgment. Plaintiff here had enough "evidence" at the present time and in the present posture to withstand summary judgment and be allowed to continue the case, obtain discovery, and present the evidence to a jury.

The Court in Eastman Kodak held that the trial judge was in error in granting summary judgment on the basis of the Matsushita

ruling because the defendants in Eastman Kodak had plausible economic incentive or motive to collude, which was lacking in Matsushita. This is the identical to what has occurred here. This Court granted certiorari in Eastman Kodak to clarify to the lower courts the level of proof which was necessary to move forward in this identical situation. The lower court opinions herein are directly in conflict with how Eastman Kodak ruled such standards are to be applied. This case presents an ideal opportunity for this Court to further finish its business begun in Eastman Kodak, as it is obvious that there is still confusion in interpretation in this all important area of the law.

Even if this case did not meet the exact criteria of Supreme Court Rule 10.1, its importance to each and every American consumer mandates that this High Court review the case by granting certiorari. It is outlandish for the defendants to make the statement that this case is no more significant or important than any other everyday summary judgment case that is decided on a factual record. Due to the magnitude of persons it will affect, and the hundreds of millions of dollars that are at issue in Tennessee alone and the billions nationwide, it is instead perhaps the most significant and important antitrust case in the past decade, if not longer. To have dismissed a case such as this at its present posture on a motion for summary judgment was clearly error. For these reasons, certiorari should accordingly be granted.

Respectfully Submitted,

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